ен па	II Limited Parti	ieis Filvilege	t Log I					
DOC#	PrivilegeType	Date	Sender/Author	То	СС	Subject Matter	BatesNumbers	RedactionReasor
1	AC/WP	12/27/2006	Joanne L. Fisher, Honigman Miller Scwartz & Cohn LLP	Linda Cheers, MMA Financial LLC	Scott Sergio, Esq.; Roberta Russ, Esq.	Letter from counsel to client re: Due Diligence Fern Hall Partnership		
2	AC/WP	12/29/2006	Nixon Peabody LLP	MMA FernHall Crossing LLC		Letter from counsel to client re: Firm Hall Partnership		Attorney-Client
3	WP	6/12/2017	Edward Ronan <edward.ronan@bfim.com></edward.ronan@bfim.com>	Jeff Rahn <jeff.rahn@bfim.com></jeff.rahn@bfim.com>		Email re: Magnolia Place and Laurel Oaks Projects in anticipation of litigation in connection with those Projects		
4	AC/WP	8/28/2017	Edward Ronan <edward.ronan@bfim.com></edward.ronan@bfim.com>	Tami McKnew <tami.mcknew@smithmoorelaw.co m=""></tami.mcknew@smithmoorelaw.co>	Jeff Rahn <jeff.rahn@bfim.com>;Mike Gladstone <mike.gladstone@bfim.com></mike.gladstone@bfim.com></jeff.rahn@bfim.com>	Email with attachments from client to counsel re: Laurel Oaks Buyout Notification		
5	AC/WP	8/28/2017	Edward Ronan	Tami McKnew <tami.mcknew@smithmoorelaw.co m></tami.mcknew@smithmoorelaw.co 	Jeff Rahn <jeff.rahn@bfim.com>;Mike Gladstone <mike.gladstone@bfim.com></mike.gladstone@bfim.com></jeff.rahn@bfim.com>	Email with attachments from client to counsel re: Laurel Oaks Buyout Notification		
6	AC/WP	8/28/2017	Edward Ronan	Tami McKnew <tami.mcknew@smithmoorelaw.co m=""></tami.mcknew@smithmoorelaw.co>		Email with attachments from client to counsel re: Magnolia Buyout Notification		
7	AC/WP	9/12/2017	Tami McKnew <tami.mcknew@smithmoorelaw.com></tami.mcknew@smithmoorelaw.com>	Mike Gladstone <mike.gladstone@bfim.com>;Edwar d Ronan <edward.ronan@bfim.com></edward.ronan@bfim.com></mike.gladstone@bfim.com>		Email with attachment from counsel to client re: Douglas litigation		
8	AC/WP	9/12/2017	Mike Gladstone <mike.gladstone@bfim.com></mike.gladstone@bfim.com>	Ken Cutillo <ken.cutillo@bfim.com>;Jeff Rahn <jeff.rahn@bfim.com></jeff.rahn@bfim.com></ken.cutillo@bfim.com>	Edward Ronan <edward.ronan@bfim.com></edward.ronan@bfim.com>	Internal BFIM Email from in-house counsel with attachment re: Douglas Litigation		
9	AC/WP	9/12/2017	Mike Gladstone <mike.gladstone@bfim.com></mike.gladstone@bfim.com>	Ken Cutillo <ken.cutillo@bfim.com>;Jeff Rahn <jeff.rahn@bfim.com></jeff.rahn@bfim.com></ken.cutillo@bfim.com>	Edward Ronan <edward.ronan@bfim.com></edward.ronan@bfim.com>	Internal BFIM Email from in-house counsel with attachment re: Douglas Litigation		

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10	AC/WP	9/18/2017	Tami McKnew <tami.mcknew@smithmoorelaw.com></tami.mcknew@smithmoorelaw.com>	Mike Gladstone <mike.gladstone@bfim.com>;Edwar d Ronan <edward.ronan@bfim.com></edward.ronan@bfim.com></mike.gladstone@bfim.com>	Email from counsel to client re: Douglas litigation
11	AC/WP	9/18/2017	Edward Ronan <edward.ronan@bfim.com></edward.ronan@bfim.com>	Tami McKnew <tami.mcknew@smithmoorelaw.co m="">;Mike Gladstone <mike.gladstone@bfim.com>;Jeff Rahn <jeff.rahn@bfim.com></jeff.rahn@bfim.com></mike.gladstone@bfim.com></tami.mcknew@smithmoorelaw.co>	Email from client to counsel re: Douglas litigation
12	AC/WP	9/18/2017	Edward Ronan	Tami McKnew <tami.mcknew@smithmoorelaw.co m="">;Mike Gladstone <mike.gladstone@bfim.com>;Jeff Rahn <jeff.rahn@bfim.com></jeff.rahn@bfim.com></mike.gladstone@bfim.com></tami.mcknew@smithmoorelaw.co>	Email from client to counsel re: Douglas Litigation
13	AC/WP	9/18/2017	Tami McKnew <tami.mcknew@smithmoorelaw.com></tami.mcknew@smithmoorelaw.com>	Edward Ronan <edward.ronan@bfim.com>;Mike Gladstone <mike.gladstone@bfim.com>;Jeff Rahn <jeff.rahn@bfim.com></jeff.rahn@bfim.com></mike.gladstone@bfim.com></edward.ronan@bfim.com>	Email from client to counsel re: Douglas litigation
14	AC/WP	9/21/2017	Tami McKnew <tami.mcknew@smithmoorelaw.com></tami.mcknew@smithmoorelaw.com>	Mike Gladstone <mike.gladstone@bfim.com>;Edwar d Ronan <edward.ronan@bfim.com>;Jeff Rahn <jeff.rahn@bfim.com></jeff.rahn@bfim.com></edward.ronan@bfim.com></mike.gladstone@bfim.com>	Email from counsel to client re: Laurel Oaks Litigation
15	AC/WP	6/14/2018	Stephen Rogers <stephen.rogers@bfim.com></stephen.rogers@bfim.com>	Janice Loving <janice.loving@bfim.com></janice.loving@bfim.com>	Email with attachment: Portfolio Risk and Investment Management Committee Memorandum re: Fern Hall Valuation ("PRIM Memo")(prepared in anticipation of litigation in connection with Fern Hall I Project)
16	AC/WP	6/14/2018	Steve Rogers	Portfolio Risk and Investment Management Committee including Mike Gladstone, in-house counsel	PRIM Memo

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17	AC/WP	6/15/2018		Armando Perez, Marie Reynolds, Jeff Rahn, Mike Gladstone, Rocio Luhring, Carrie Octavio, Silvia Rimolo,Steven West, Stephen Rogers, Stephen Burns, Kristen Duffy, Alex Chan		Appointment re: PRIM Presentations; attaches PRIM Memo	
18	AC/WP	6/18/2018	Janice Loving		ephen Burns; Kristen Duffy; ex Chan	Appointment re: PRIM Presentations; attaches PRIM Memo	
19	AC/WP	6/19/2018	Janice Loving <janice.loving@bfim.com></janice.loving@bfim.com>	Sara Ahlander <sara.ahlander@bfim.com></sara.ahlander@bfim.com>		Email Re: PRIM Memos; attaches PRIM Memo	
20	AC/WP	6/22/2018	Sara Ahlander <sara.ahlander@bfim.com></sara.ahlander@bfim.com>	Fund Managers <fundmanagers@bfim.com></fundmanagers@bfim.com>		Email Re: PRIM Memos; attaches PRIM Memo	
21	AC/WP	6/26/2017	Janice Loving	Janice Loving, Jeff Rahn, Ali Abdullah, Bill Miller, Edward Ronan, Eric BFIM, Eric Bonney, Eric Rosenthal,Lisa Grammatikov, Mike Gladstone, Nancy Powell, Stephen Rogers, Steven West, Greg Voyentzie, Armando Perez,William Anderson, Kathryn Farrell, Abby Banholzer, Fund Managers, Matthew Delaney, David J. Fernandes,Geoffrey Giancola, Stephen Burns, Jerry Abrahams, Ken Cutillo, Marie Reynolds, Rocio Luhring, Sara Ahlander,Sarah Laubinger, Matthew Strauss		Appointment: Screening Committee: Disposition Refinancing and Workout attaches Capital Transaction Team ("CTT") Report below	
22	AC/WP	6/26/2017	Edward Ronan and multiple authors			CTT Report/Weekly Priority Deals: Magnolia and Laurel Oaks Projects prepared in anticipated of litigation in connection with those projects	

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23	AC/WP	7/10/2017	Janice Loving	Ali Abdullah, Bill Miller, Edward Ronan, Eric BFIM, Eric Bonney, Eric Rosenthal, Jeff Rahn, Lisa Grammatikov,Mike Gladstone, Nancy Powell, Stephen Rogers, Steven West, Greg Voyentzie, Armando Perez, Ken Cutillo,Marie Reynolds, Rocio Luhring, Sara Ahlander, Sarah Laubinger, William Anderson, Kathryn Farrell, Abby Banholzer,Fund Managers, Matthew Delaney, David J. Fernandes, Geoffrey Giancola, Stephen Burns, Jerry Abrahams, Matthew Strauss, David Anastasi, Jill Whitney, Dave Brady, Andrew Philips	Appointment: Screening Committee: Disposition Refinancing and Workout attaches CTT Report below	
24	AC/WP	7/6/2017	Edward Ronan and multiple authors		CTT Report/Weekly Priority Deals: buyout option process for Magnolia and Laurel Oaks Projects prepared in anticipated of litigation in connection with those projects	
25	WP		Janice Loving	Ali Abdullah, Bill Miller, Edward Ronan, Eric BFIM, Eric Bonney, Eric Rosenthal, Jeff Rahn, Lisa Grammatikov,Mike Gladstone, Nancy Powell, Stephen Rogers, Steven West, Greg Voyentzie, Armando Perez, Ken Cutillo, Marie Reynolds, Rocio Luhring, Sara Ahlander, Sarah Laubinger, William Anderson, Kathryn Farrell, Abby Banholzer, Fund Managers, Matthew Delaney, David J. Fernandes, Geoffrey Giancola, Stephen Burns, Jerry Abrahams, Matthew Strauss, David Anastasi, Dave Brady, Andrew Philips, Jerry Abrahams, Lisa Carpenter, Trevor Johnson,	Appointment: Screening Committee: Disposition Refinancing and Workout attaches CTT Report below	

WP	7/28/2017	Unknown Author	Eric BFIM, William Anderson, Kathryn Farrell, Matthew Delaney, David J. Fernandes, Geoffrey Giancola, Stephen Runs, Jill	Capital Transaction Team Report/Weekly Priority Deals: Douglas Litigation, Magnolia Place and Laurel Oaks Canceled: Screening Committee: Disposition, Refinancing and Workout attaches CTT Report	
WP	8/14/2017	Janice Loving	Whitney	below	!
WP	8/11/2017	Unknown author		Capital Transaction Team Report/Weekly Priority Deals: Douglas Litigation, Magnolia Place and Laurel Oaks prepared in anticipated of litigation in connection with those projects	
AC/WP	8/25/2017	Janice Loving <janice.loving@bfim.com></janice.loving@bfim.com>	li Abdullah; Bill Miller; Edward Ronan; Eric BFIM; Eric Bonney; Eric Rosenthal; Jeff Rahn; Lisa Grammatikov; Mike Gladstone; Nancy Powell; Stephen Rogers; Steven West; Greg Voyentzie; Armando Perez; Ken Cutillo; Marie Reynolds; Rocio Luhring; Sara Ahlander; Sarah Laubinger; William Anderson; Kathryn Farrell; Abby Banholzer; Fund Managers; Matthew Delaney; David J. Fernandes; Geoffrey Giancola; Stephen Burns; Jerry Abrahams; Matthew Strauss; David Anastasi; Dave Brady; Andrew Philips; Jerry Abrahams; Brian Benson; Michael Butler; Carolyn Grassick; Cameron Church; Marshall Daniels	Email Re: Capital Transaction Committee Screening - Monday, August 28 attaches CTT Report below	
		, , ,		CTT Report/Weekly Priority Deals	
AC/WP	8/25/2017	Edward Ronan and multiple authors		re: buyout option process for Magnolia and Laurel Oaks Projects in anticipated of litigation in connection with those projects	
	WP	WP 8/14/2017 WP 8/11/2017 AC/WP 8/25/2017	WP 8/11/2017 Unknown author AC/WP 8/25/2017 Janice Loving < Janice.Loving@bfim.com>	WP 8/14/2017 Janice Loving WP 8/14/2017 Unknown author II Abdullah; Bill Miller; Edward Ronan; Eric BFIM; Eric Bonney; Eric Rosenthal; Jeff Rahn; Lisa Grammtkov, Mike Gladstone; Nancy Powell; Stephen Rogers; Steven West; Greg Voyentzie; Armando Perz; Ken Cutillo; Marie Reynolds; Rocio Lubring; Sara Ahlander; Sarat Laubinger; William Anderson; Kathryn Farrell; Abby Banholzer; Fund Managers; Matthew Delaney; David J. Fernandes; Geoffrey Giancola; Stephen Brages; Jerry Abrahams; Jeff Rahn; Lavinger; Matthew Delaney; David J. Fernandes; Geoffrey Giancola; Stephen Burns; Jerry Abrahams; Matthew Strauss; David Anastasi; Dave Brady; Andrew Philips; Jerry Abrahams; Brian Benson; Michael Butler; Carolyn Grassick; Cameron Church; Marshall Daniels	Report/Weekly Priority Deals: Douglas Litigation, Magnolia Place and Laurel Oaks Eric BFIM, William Anderson, Kathryn Farrell, Matthew Delaney, Dawld J. Farmandes, Geoffrey Giancola, Stephen Burns, Jill Workout attaches CTT Report below WP 8/14/2017 Janice Loving Whitney British Addullah; Bill Miller; Edward Ropart, Lisa Grammalkov, Mike Gladstone; Nancy Powell: Stephen Rogers; Steven West; Greg Voyentzie; Armando Perez; ken Caulitio, Manie Reynolds, Rocio Lutring; Sarra Ahlander, Sarah Lusbinger, William Anderson; Kathryn Farrell; Abby Banholzer, Fund Managers, Matthew Delaney; David J. Fernandes; Gedfrey Glancias, Stephen Burns; Jerry Abrahams, Matthew Delaney; David J. Fernandes; Gedfrey Glancias, Stephen Burns; Jerry Abrahams, Matthew Delaney; David J. Fernandes; Gedfrey Glancias, Stephen Burns; Jerry Abrahams, Matthew Delaney; David J. Fernandes; Gedfrey Glancias, Stephen Burns; Jerry Abrahams, Matthew Delaney; David J. Fernandes; David Ansatsel, David Canadas, Camero Committee Screening - Monday, Algust 28 attaches CTT Report below CTT Report/Weekly Priority Deals re: buyout option process for Magnolia and Laurel Oaks Projects in anticipated of liligation in in

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31	WP	9/18/2017	Janice Loving	Ali Abdullah, Bill Miller, Edward Ronan, Eric BFIM, Eric Bonney, Eric Rosenthal, Jeff Rahn, Lisa Grammatikov, Mike Gladstone, Nancy Powell, Stephen Rogers, Steven West, Greg Voyentzie, Armando Perez, Ken Cutillo, Marie Reynolds, Rocio Luhring, Sara Ahlander, Sarah Laubinger, William Anderson, Kathryn Farrell, Abby Banholzer, Fund Managers, Matthew Delaney, David J. Fernandes, Geoffrey Giancola, Stephen Burns, Jerry Abrahams, Matthew Strauss, David Anastasi, Jill Whitney, Dave Brady, Andrew Philips, Jerry Abrahams, Brian Benson, Trevor Johnson, Michael Butler, Nicole Jaynes, Sean Beirne	Appointment: Screening Committee: Disposition Refinancing and Workout attaches CTT Report below	
32	WP	9/15/2017	Edward Ronan and multiple authors		Capital Transaction Team Report/Weekly Priority Deals: Douglas Litigation, Magnolia Place and Laurel Oaks in anticipated of litigation in connection with those projects	

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33	AC/WP	9/25/2017	Janice Loving	Janice Loving, Ali Abdullah, Bill Miller, Edward Ronan, Eric Bonney, Eric Rosenthal, Jeff Rahn, Lisa Grammatikov, Mike Gladstone, Nancy Powell, Stephen Rogers, Steven West, Greg Voyentzie, Armando Perez, Ken Cutillo, Marie Reynolds, Rocio Luhring, Sara Ahlander, Sarah Laubinger, Kristen Duffy, Marshall Daniels, William Anderson, Kathryn Farrell, Fund Managers, Matthew Delaney, David J. Fernandes, Geoffrey Giancola, Stephen Burns, Jerry Abrahams, Matthew Strauss, David Anastasi, Dave Brady, Andrew Philips, Abrahams, Jerry, Brian Benson, Michael Butler, Nicole Jaynes, Sean Beirne, Lisa Carpenter	Appointment: Screening Committee: Disposition, Refinancing and Workout attaches CTT Report below	
34	WP	9/21/2017	Edward Ronan and multiple authors		CTT Report/Weekly Priority Deals litigation with respect to Magnolia and Laurel Oaks Projects	

FERN HALL PRIVILEGE LOG I - EMAIL RECIPIENTS

Ali Abdullah Senior Analyst, Capital Transactions (No longer with BFIM)

Jerry Abrahams Chief Executive Officer of ORIX Commercial Mortgage Servicing Inc.

David Anastasi Vice President, Fund Management (No longer with BFIM)

William Anderson First Vice President, Capital Transactions (Workouts)

Sara Ahlander Senior Vice President, Fund Management

Abby Banholzer Executive Assistant to CEO (No longer with BFIM)

Sean Beirne Senior Associate, Production Group

Brian Benson Vice President, Fund Management

Eric Bonney First Vice President, Capital Transactions (Workouts)

Stephen Burns First Vice President, Asset Management

David Brady Vice President, Fund Management

Michael Butler Vice President, Fund Management

Lisa Carpenter Vice President, Asset Management

Alex Chan Vice President, Asset Management

Cameron Church AVP, Asset Management (No longer with BFIM)

Ken Cutillo Chief Executive Officer of BFIM (No longer with BFIM)

Marshall Daniels Vice President, Asset Management

Matthew Delaney First Vice President, Asset Management

Kristen Duffy Vice President, Asset Management

Kathryn Farrell First Vice President, Capital Transactions

David J. Fernandes First Vice President, Asset Management

Geoffrey Giancola First Vice President, Asset Management

Mike Gladstone Executive Vice President, General Counsel

Lisa Grammatikov First Vice President, Capital Transactions

Carolyn Grassick Vice President, Asset Management

Nicole Jaynes Executive Assistant to CEO

Trevor Johnson Vice President, Asset Management (No longer with BFIM)

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Sarah Laubinger Executive Vice President, Production

Janice Loving Adminstrative Assistant

Rocio Luhring Senior Vice President, Asset Management

Gavin McClear First Vice President, Fund Management

Bill Miller Vice President, Capital Transactions

Carrie Octavio Vice President, Asset Management

Armando Perez Executive Vice President, Investment Management

Andrew Phillips First Vice President, Fund Management

Nancy Powell First Vice President, Capital Transactions

Jeffrey Rahn Executive Vice President, Capital Transactions

Marie Reynolds Executive Vice President, Chief Financial Officer

Silvia Rimolo Vice President, Asset Management (No longer with BFIM)

Stephen Rogers First Vice President, Capital Transactions

Edward Ronan First Vice President, Capital Transactions

Eric Rosenthal Senior Analyst, Capital Transactions (No longer with BFIM)

Matthew Strauss AVP, Production

Greg Voyentzie Chief Executive Officer of BFIM

Steven West First Vice President, Capital Transactions

Jill Whitney Vice President, Fund Management (No Longer with BFIM)

Fund Managers Listed Above

rem		nited Partners' Privilege Log II				
Privilege						
Type	Date	Sender/Author	То	cc	всс	Subject Matter
AC/WP		Mike Gladstone 7 <mike.gladstone@bfim.com></mike.gladstone@bfim.com>	Ken Cutillo Ken Cutillo@bfim.com">Ken.cutillo@bfim.com ; Marie Reynolds@bfim.com; 'Andrew McB. Garvey (andrew.garvey@orix.com)' <andrew.garvey@orix.com< a="">; 'Jerry Abrahams (Jerry.Abrahams@orix.com)' <jerry.abrahams@orix.com< a="">; Greg Voyentzie <greg.voyentzie@bfim.com< a="">; Jeff Rahn <jeff.rahn@bfim.com< a="">; Edward Ronan <edward.ronan@bfim.com< a="">; 'Ron K. Barger (ron.barger@orix.com)' <ron.barger@orix.com< a="">; Nguyen, Cliff <cliff.nguyen@orix.com></cliff.nguyen@orix.com></ron.barger@orix.com<></edward.ronan@bfim.com<></jeff.rahn@bfim.com<></greg.voyentzie@bfim.com<></jerry.abrahams@orix.com<></andrew.garvey@orix.com<>			Email atttaching Executive Summary re: Douglas Litigation
WP	7/5/20	18 Gavin McLear <gavin.mclear@bfim.com></gavin.mclear@bfim.com>	Sara Ahlander <sara.ahlander@bfim.com></sara.ahlander@bfim.com>			Email re: Portfolio Risk and Investment Management Committee Memorandum re: Fern Hall Valuation ("PRIM Memo")(prepared in anticipation of litigation in connection
WP	2/1/20	18 Edward Ronan	Capital Transaction Committee			Presentation re: Laurel Oaks Litigation
WP	2/1/20	18 Edward Ronan	Capital Transaction Committee			Presentation re: Magnolia Bay Litigation
AC/WP	9/6/20	Mike Gladstone 18 <mike.gladstone@bfim.com></mike.gladstone@bfim.com>	Tami McKnew <tami.mcknew@smithmoorelaw.com></tami.mcknew@smithmoorelaw.com>	Jeff Rahn <jeff.rahn@bfim.com>/Steph en Rogers <stephen.rogers@bfim.com></stephen.rogers@bfim.com></jeff.rahn@bfim.com>		Email with attachment re: Wellington Senior Apartments

	4.0	0/0/0040	Mike Gladstone	Stephen Rogers	Jeff Rahn		Email with attachment re: Wellington	
6	AC	9/6/2018	<pre><mike.gladstone@bfim.com></mike.gladstone@bfim.com></pre>	<stephen.rogers@bfim.com></stephen.rogers@bfim.com>	<jeff.rahn@bfim.com></jeff.rahn@bfim.com>		Senior Apartments	
			Stephen Rogers	Mike Gladstone			Email with attachment re: Wellington	
7	AC	9/6/2018	<stephen.rogers@bfim.com></stephen.rogers@bfim.com>	<mike.gladstone@bfim.com></mike.gladstone@bfim.com>			Senior Apartments	
8	AC		Stephen Rogers <stephen.rogers@bfim.com></stephen.rogers@bfim.com>	Mike Gladstone <mike.gladstone@bfim.com></mike.gladstone@bfim.com>	Jeff Rahn <jeff.rahn@bfim.com></jeff.rahn@bfim.com>	Stephen Rogers <stephen. Rogers@ bfim.com</stephen. 	Email with attachment re: Wellington Senior Apartments	
9	AC	4/25/2018	Edward Ronan <edward.ronan@bfim.com></edward.ronan@bfim.com>	Susan Donahue <susan.donahue@bfim.com></susan.donahue@bfim.com>			Email with attachment re: Laurel Oaks	
10	AC/WP	4/25/2018	Edward Ronan <edward.ronan@bfim.com></edward.ronan@bfim.com>	Susan Donahue <susan.donahue@bfim.com></susan.donahue@bfim.com>			Email with attachment re: Magnolia Place	
11	WP	9/5/2018	Edward Ronan <edward.ronan@bfim.com></edward.ronan@bfim.com>	Stephen Rogers <stephen.rogers@bfim.com></stephen.rogers@bfim.com>			Email with attachment re: Laurel Oaks	
12	AC/WP	10/20/2017	Edward Ronan	Capital Transaction Team			Report re: Magnolia Place and Laurel Oaks litigation	
13	AC/WP	10/27/2017	Edward Ronan	Capital Transaction Team			Report re: Magnolia Place and Laurel Oaks litigation	
14	AC	12/4/2006	Tom Louloudes <tlouloudes@mmafin.com></tlouloudes@mmafin.com>	Scott Sergio			Email re: Fern Hall Due Diligence Checklist	Produc 4/10/20
15	AC	12/4/2006	Scott Sergio <ssergio@nixonpeabody.com></ssergio@nixonpeabody.com>	Tom Louloudes			Emaill re: Fern Hall Due Diligence Checklist	Produc 4/10/20
16			Nixon Peabody				Due Diligence Checklist for MMA Equity/MMA Debt: Fern Hall I with attorney notes	Produce 4/10/20

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						Email chain 12/18/2006 between T.	Draduand
						Louloudes and Scott Sergio re: Fern	
17	AC	12/20/2006	Tom Louloudes	Scott Sergio		Hall I	4/10/20
						Fern Hall I Short Form Due Diligence	Produced
18	AC	12/28/2006	Nixon Peabody			Checklist with attorney notes	4/10/20
						Email with attachment re: Fern Hall	Produced
19	AC	1/9/2007	Forrest Milder <fmilder@nixonpeabody></fmilder@nixonpeabody>	Scott Sergio	Arthur Hittner	Phase I	4/10/20

Evans, Rebecca

From: Karen E. Friedman < kfriedman@luriefriedman.com>

Sent: Monday, April 20, 2020 7:15 AM

To: Davenport, David; Hagstrom, Alexander M.

Cc: Andrea L. Martin; David E. Lurie **Subject:** Fern Hall - Privilege Issues

Attachments: FH.PrivilegeLogI.revised.pdf; FH.LP.Privilege LogII.revised.pdf

Counsel -

The following supplements our responses of April 2, 2020 and April 10, 2020 to your letter of March 31, 2020 regarding the Limited Partners' Privilege Logs in the Fern Hall. As a preliminary matter, revised versions of both Logs are attached. The revised Logs number the identified documents, identify the author for Documents 26 and 28 on Log I, correct Entry 17 on Log II, note that the Nixon Peabody documents have been produced on Log II and, on Log I, add a list of the recipients of the emails at issue with their capacity/title at BFIM.

Your letter raised concerns regarding the Limited Partners' claims of attorney-client privilege and/or work product protection for the following documents:

I. The CTT Reports, Cover Emails and Edward Ronan Email (Privilege Log I, Entries 3 and 21-34)

The CTT Reports (the "Reports") are a compilation of electronic entries containing information regarding the status of specific projects in which BFIM is invested. Each entry is written by an individual with responsibility for the project. The Reports are shared with employees of BFIM who also have supervisory responsibility for the projects or overall supervisory authority. The documents are marked and treated as confidential. The only entries on these Reports responsive to the General Partner's discovery requests are entries for the Magnolia and Laurel Oaks projects. Those entries are identified on the Privilege Log because they refer to Cushman & Wakefield and Philip Jones had prepared the appraisals of the limited partner interests in those projects. The cover emails contain no information responsive to the General Partner's discovery requests and are listed on the Privilege Log only to identify the senders and recipients of the Reports.

While each Report, as compiled, had multiple authors, all of the entries for the Magnolia and Laurel Oaks projects (including Entry 26 and 28) were written by Edward Ronan, who had specific responsibility for the Project as it entered Year 15. The first of these entries is dated June 26, 2017 and the last is dated September 15, 2017. In these entries, Mr. Ronan is reporting internally on the status of an evolving dispute with the General Partner regarding the valuation of the limited partner interests in the Magnolia and Laurel Oaks projects and, in the later entries, on the status of litigation filed in South Carolina as a result of that dispute. As reflected on the Privilege Log, Mr. Ronan was also involved in the progress of that litigation and participated in communications with South Carolina counsel and Mike Gladstone, BFIM's in-house and General Counsel. These entries were drafted in anticipation of litigation. By April 2017, BFIM had consulted with outside counsel for legal advice regarding its rights at the end of compliance under the Magnolia and Laurel Oaks partnership agreements. Mr. Ronan had had an acrimonious phone call with Drew Schaumber in early June regarding the relevance of capital accounts to the buyout price for the limited partner interests. BFIM had contacted and engaged local counsel in South Carolina by July 2017 in connection with this dispute. Litigation subsequently was filed in August 2017. In writing the entries for the Magnolia and Laurel Oaks projects, Mr. Ronan had reason to believe that litigation would ensue – as indeed, it did. See In re Grand Jury Subpoena, 220 F.R.D. 130, 148 (D. Mass. 2004). (while "anticipation" requires something more than a "mere remote possibility", a subjective belief that litigation was a real possibility and an objectively reasonable apprehension of litigation supports protection of the documents). Likewise, the email from Mr. Ronan to Jeff Rahn dated June 12, 2017 was written after BFIM had consulted with outside counsel and after Mr. Ronan's phone call with Mr. Schaumber.

While the Reports are routinely prepared in the ordinary course of business to keep the relevant officers and employees apprised of the status of certain projects, the entries specific to the Magnolia and Laurel Oaks projects were not drafted in the ordinary course of business. The entries contain the thoughts and mental impressions of BFIM with respect to its rights under the relevant partnership agreements and the valuation of its interests. See Bryan Corp. v. Chemwerth, 296 F.R.D. 31, 35 (D. Mass. 2013). They were prepared and written because litigation was anticipated and, in fact, ensued. The content for the Magnolia and Laurel Oaks entries would have been entirely different had there been no dispute. In the First Circuit, dual-purpose documents are protected by work product protection. Kellogg USA, Inc. v. B. Fernandez Hermanos, Inc., 269 F.R.D. 95, 100 (D.P.R. 2009). The protection applies "if in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation." Mississippi Pub. Employees' Ret. Sys. v. Bos. Sci. Corp., 649 F.3d 5, 31 n.4 (1st Cir. 2011). Work product does not lose protection merely because it is also "intended to inform a business decision influenced by the prospects of the litigation." Id. The fact that the Reports may also address valuation issues does not undermine the work product protection when the anticipated and actual legal dispute concerned BFIM's rights under the partnership agreement with respect to valuation of its interests.

Finally, the fact that the Reports were shared with multiple individuals within BFIM does not undermine its work product protection. Work product protection is not waived merely by disclosure to a third person but only when documents are used in a manner contrary to the doctrine's purpose. Bryan Corp., 296 F.R.D. at 38. "The purpose of the work product privilege is to protect information against opposing parties, rather than against all others outside a particular confidential relationship in order to encourage effective trial preparation... A disclosure made in pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents should be allowed without waiver of the privilege." Id. (internal citations omitted). Waiver occurs where the disclosure is made to an adversary or potential adversary. Id. (internal citations omitted).

The entries regarding the Magnolia and Laurel Oaks projects are also protected by the attorney-client privilege. They reflect BFIM's opinion of its legal rights and were provided to Mike Gladstone, in-house and General Counsel, who was actively engaged with South Carolina counsel in the litigation. The fact that the reports were sent to other officers and employees within BFIM does not undermine the privilege. They were not "disseminated beyond those persons who, because of the corporate structure, need to know its contents." See Tinian Sys., LLC v. Core Campus Columbia I, LLC, No. 3:15-CV-1102-JFA, 2016 WL 11643760, at *2 (D.S.C. Aug. 19, 2016).

Finally, the Magnolia and Laurel Oaks projects are not subject of this litigation and we reserve our objections regarding relevance, overbreadth, and burdensomeness.

II. The PRIM Memorandum and Cover Emails (Log I, Entries 15-20; Log II, Entry 2)

The PRIM Memorandum was written by Stephen Rogers in June 2018 in anticipation of a dispute with Bradley Fern Hall I, LLC regarding the valuation of the Limited Partners' interests in the Fern Hall project. It specifically refers to an anticipated legal challenge. BFIM had good reason to believe it would be involved in litigation on the Fern Hall project given its earlier experience with the Magnolia and Laurel Oaks projects, the relationship between David Douglas and Bradley Queener and the DASH litigation in Washington. Within three months of preparation of this memo, BFIM had contacted our firm in connection with this case. Furthermore, it is protected as a "dual-purpose" document. It interprets specific language of the Partnership Agreement and addresses valuation issues within the context of the Limited Partners' legal rights under the Partnership Agreement. For the reasons stated above, the fact that it was sent to multiple officers and employees within BFIM does not undermine this protection. Finally, it is also protected by the attorney-client privilege as it was shared with in-house counsel and General Counsel who has been heavily involved in articulating the legal theories and opinions relevant to this case.

Please let me know if you would like to schedule a meet and confer to discuss these issues further. Also, please send us your privilege log or confirm that you have not withheld anything based on attorney-client privilege or work product protection.

Thank you.

Karen E. Friedman Lurie Friedman LLP One McKinley Square I Boston, MA 02109 T: 617.367.1970 I F: 617.367.1971

kfriedman@luriefriedman.com | www.luriefriedman.com



UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

MMA FERN HALL CROSSING LLC, and BFIM SPECIAL LIMITED PARTNER, INC.,)))
Plaintiffs,)
v.) Case No. 1:18-cv-12486
BRADLEY-FERN HALL I, LLC,)
Defendant.)))

AFFIDAVIT OF STEPHEN ROGERS IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

- I, Stephen Rogers, hereby depose and state as follows:
- 1. I am First Vice President at Boston Financial Investment Management, LP ("BFIM"). BFIM is the owner of BFIM Special Limited Partner, Inc., a plaintiff in this action, and provides management services to MMA Fern Hall Crossing, LLC, the other plaintiff in this action. I submit this Affidavit in Support of Plaintiffs' Opposition to the Motion to Dismiss First Amended Complaint filed by the defendant in this action, Bradley-Fern Hall I, LLC. This Affidavit is based on my personal knowledge.
- 2. BFIM is a national leader in the low-income housing tax credit ("LIHTC") industry, and provides syndication services as well as asset and portfolio management. BFIM works with investors and developers to make successful LIHTC investments in high quality assets that create affordable housing opportunities in urban and rural communities across the United States. BFIM has invested billions of dollars in equity in LIHTC properties since 1986 and currently manages a \$7.2 billion portfolio comprising over 1,165 properties and 103,000

units, making BFIM one of the largest and most experienced syndicators in the tax credit industry.

- 3. My role within BFIM is Disposition Specialist within its Capital Transaction group. My primary responsibility is to manage BFIM's Investor Limited Partner and Special Limited Partner investments in various partnerships as they approach the end of the LIHTC compliance periods. In this capacity, it is my responsibility to understand the Limited Partners' rights as the compliance period nears and prepare for and manage BFIM's withdrawal from the partnerships at the appropriate time.
- 4. MMA Fern Hall Crossing, LLC has been the investor limited partner (the "Investor Limited Partner") in the Fern Hall Limited Partnership (the "Partnership") since December 2006. BFIM Special Limited Partner, Inc. has been the special limited partner (the "Special Limited Partner") (together, the "Limited Partners").
- 5. The Partnership is a single-purpose limited partnership the purpose of which is to construct, develop, operate, and manage a low-income housing development in South Carolina (the "Project"). The Project was developed to qualify for Federal Low-Income Housing Tax Credits pursuant to Section 42 of the Internal Revenue Code, 26 U.S.C. § 42. As such, the Project generated Federal tax credits for the Limited Partner and is subject to a 15-year Compliance Period which will expire this year on December 31, 2018.
- 6. At the end of the Compliance Period, the Fern Hall partners have certain rights as described in the Limited Partnership Agreement (the "LPA"). The Investor Limited Partner has the right to force a sale of the Project "at any time" (the "Forced Sale Right"). LPA, Section 6.4J. Exercise of the Forced Sale Right leads to dissolution of the Partnership and requires distribution of Partnership assets in accordance with any positive balance in the Limited

Partners' capital accounts. LPA, Article III.A and Section 10.2A (the "Liquidation Provision"). The Investor Limited Partner's capital account in this case has a positive balance.

- 7. In addition, the General Partner has the right to buy out the Limited Partners' interests in the Partnership for one year following the end of the Compliance Period. LPA, Section 6.13 (the "Option"). The Option may be exercised only on written notice which must include an appraisal of the fair market value of the Investor Limited Partner's interest in the Partnership. Id., Sections 6.13C(ii)(2); 6.13D.
- 8. For the purposes of determining the fair market value of the Limited Partners' interests, the appraiser is directed to consider the value of the assets of the Partnership. The appraiser must also "give due consideration to all other relevant factors" relating to the value of those interests including the Investor Limited Partner's ability to require liquidation. <u>Id.</u>, Section 6.13E(iv).
- 9. The Forced Sale Right and the Option are simultaneous rights. Therefore, in determining the fair market value of the Investor Limited Partner's interest for the purposes of the General Partner's exercise of the Option, the appraiser must give due consideration to the Investor Limited Partner's ability to force a sale which would lead to liquidation and distribution of Partnership assets in accordance with the positive balances in the capital accounts.
- 10. In anticipation of the end of the Compliance Period, the attorney for the managing member of the General Partner contacted me, informing me that her client, Bradley Queener, wanted to discuss a potential buy-out by the General Partner of the Limited Partners' interests.

 The discussion involved Mr. Queener's right at the end of the compliance period to purchase the Limited Partners' interests; his desire to start the process early; and to proceed in a less formal

manner in order to limit costs. I informed Mr. Queener's counsel that BFIM could accommodate the request and that I would reach out to him directly.

- 11. During the initial conversation with Mr. Queener, he indicated that he intended to exercise the General Partner's Option upon expiration of the Compliance Period. However, in the course of our discussions regarding the Option price, it became apparent that we had a significant disagreement with respect to interpretation of the LPA regarding whether the Limited Partners' capital accounts have to be taken into account in determining the fair market value of their partnership interests.
- 12. I maintained that any valuation of the Investor Limited Partner's interest must consider its positive capital account as required by the Liquidation Provision.
- 13. Mr. Queener, on the other hand, claimed that the fair market value of the Investor Limited Partner's interest should be determined as if a "Capital Transaction" prior to dissolution had occurred with proceeds distributed according to Section 10.1B of the LPA (the "Waterfall Provision"). The Waterfall Provision makes no reference to the Investor Limited Partner's capital accounts. Instead, it distributes 90% of the available proceeds from the transaction to the General Partner but only 10% of the proceeds to the Investor Limited Partner. Mr. Queener insisted that the fair market value of the Investor Limited Partner's interest would not reflect the balance in its capital account. Mr. Queener indicated he would discuss BFIM's conclusion with his attorneys, Attorneys Scogin and Davenport, and determine next steps.
- 14. In an email dated October 3, 2018, Mr. Queener forwarded an email from his attorney, in which his attorney maintained that the value of the Investor Limited Partner's interest would be calculated based on the Waterfall, not the Liquidation Provision. The attorney recommended that "if you are unable to reach an agreement on a purchase price with [BFIM],

next step will be to bring in Davenport to proceed to enforce your rights under the [LPA]". We were aware that Attorney Davenport, who represents the General Partner in this action, was a litigator who had represented associates of Mr. Queener in the past and that this indicated Mr. Queener was considering filing suit on this matter regarding his rights under the LPA.

- 15. I responded with an email on October 19, 2018 in which I indicated an interest in attempting to resolve the matter but reiterated BFIM's position that calculation of the fair market value of the Investor Limited Partner's interest must take into account its positive capital account.
- 16. Mr. Queener responded on October 24, 2018 and forwarded another email from his attorney again disputing the Limited Partners' interpretation of the LPA. The attorney recommended that Mr. Queener "take legal action to seek an interpretation of the [LPA]" if he could not reach an agreement with the Limited Partners on a purchase price by November 15, 2018 or thereabouts. In addition, she asked Mr. Queener to provide:

some days/times you are available next week and I will set up a call with Davenport to update him on status. Given the short time frame, I think we need to loop him back in now in case you are unable to reach an agreement on price.

We understood the attorney's request to set up a call and the reference to a "short time frame" as a clear sign that the General Partner intended to file suit regarding interpretation of the LPA if the matter could not be resolved to Mr. Queener's satisfaction. Our email exchange is attached to this Affidavit as Exhibit A.

17. In a subsequent telephone call and my last communication with Mr. Queener on November 6, 2018, he unequivocally rejected the Limited Partners' interpretation of the LPA. He stated that there was nothing more to discuss, that the Limited Partners had no chance of winning on this issue and that when the General Partner prevailed, he would gladly accept a

check from BFIM for his attorney's fees. Mr. Queener also said he would consult with his attorneys, including Attorney Davenport, regarding next steps. He made it clear that paying the Investor Limited Partner anything close to the value of its capital account was not a

consideration under his interpretation of the LPA.

18. Given the intractable nature of the interpretive dispute with respect to determining

the fair market value of the Investor Limited Partner's interest under the LPA and the General

Partner's statement that there was nothing more to discuss and the explicit threat to pursue

litigation, the Limited Partners filed suit in Massachusetts state court as provided under the LPA

seeking a declaration of the parties' rights under the LPA. LPA, Section 13.7D.

19. In light of the parties' dispute as to whether the Option price should reflect the

Investor Limited Partner's positive capital account, the Limited Partners intend to exercise their

Forced Sale Right immediately after the end of the Compliance Period in order to ensure that

they receive the value of those accounts.

Signed this 20th day of December under the penalties of perjury.

/s/ Stephen Rogers_

STEPHEN ROGERS

CERTIFICATE OF SERVICE

I, Karen E. Friedman, hereby certify that this document filed through the CM/ECF system be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on December 20, 2018.

/s/ Karen E. Friedman

Karen E. Friedman (BBO #548943)

6

Exhibit A

From: Brad Queener [mailto:brad@bradleydevelopers.com]

Sent: Wednesday, October 24, 2018 3:19 PM
To: Stephen Rogers < Stephen.Rogers@bfim.com>

Subject: Fwd: Fern Hall

Stephen -

Hope all is well. Please see response below. Let's have a call and see if we can resolve.

Thank you, Brad

Begin forwarded message:

From: "Scogin, Carolyn W." < < CWS@blancolaw.com >

Subject: RE: Fern Hall

Date: October 23, 2018 at 8:50:24 PM EDT

To: 'Brad Queener' < <u>brad@bradleydevelopers.com</u> > **Cc:** "Scogin, Carolyn W." < <u>CWS@blancolaw.com</u> >

Brad, the position that BF is taking below on the forced sale is in direct opposition to the position that was taken by BF on Plantation. When the buyer of your Plantation interest requested that BF clarify 6.4J/6.13, BF's response was that 6.4J and 6.13 did not conflict and that it was inherent in the OPA language that 6.4(J) was "subject to the terms and conditions of 6.13." At the end of the day, the buyer on Plantation requested and BF granted a 30 day notice period, but this notice period does not make a material difference. I recommend you take legal action to seek an interpretation of the OPA if you cannot reach an agreement with BF on a purchase price by around 11/15/18. Let me know some days/times you are available next week and I will set up a call with Davenport to update him on status. Given the short time frame, I think we need to loop him back in now incase you are unable to reach an agreement on price. Thanks.

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Carolyn W. Scogin Attorney at Law cws@blancolaw.com Bio | vCard

Main: 336.293.9000 Direct: 336.293.9063 Mobile: 336.918.6815 Fax: 336.293.9030

P.O. Drawer 25008 • Winston-Salem • NC • 27114-5008 110 South Stratford Road, Suite 500 • Winston-Salem • NC • 27104-4299

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From: Brad Queener [mailto:brad@bradleydevelopers.com]

Sent: Friday, October 19, 2018 2:39 PM

To: Scogin, Carolyn W. **Subject:** Fwd: Fern Hall

www.bradleydevelopers.com

Begin forwarded message:

From: Stephen Rogers < <u>Stephen.Rogers@bfim.com</u>>

Date: October 19, 2018 at 2:34:41 PM EDT

To: Brad Queener

 brad@bradleydevelopers.com>

Subject: RE: Fern Hall

Brad,

Thank you for your patience. BFIM has re-reviewed Fern Hall's Partnership document and we disagree with your attorney's conclusion. The language of the Plantation Agreement and the language of the Fern Hall agreement are very different. Under the Plantation Agreement, the Investor Member may not exercise its forced sale right for the first year after the Compliance Period unless it gives the Managing Member notice and 30 days to exercise its option to purchase. There is no language likes this in the Fern Hall LPA. The Investor Limited Partner's forced sale right and the buyout option are simultaneous rights and the Investor Limited Partner may exercise its forced sale right "at any time." Therefore, we conclude that the liquidation provision applies and the fair market value calculation to determine the Buyout Price must consider the Investor Limited Partner's ability to require liquidation in determining the value of the interests. BFIM concludes that Section 6.4J provides the Investor Limited Partner this ability; to direct a sale of the property which would result in a liquidation

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event. That ability to require liquidation would result in liquidation proceeds for the Parties which the appraiser must properly allocate according to capital accounts.

Despite the difference in our interpretations of the relevant LPA provisions, I remain hopeful that we can achieve a resolution of this matter. We look forward to your thoughts regarding our interpretation of the contract language.

Regards, Steve

Stephen Rogers | First Vice President | Capital Transactions
Boston Financial Investment Management, LP | 101 Arch Street | Boston, MA 02110
(P) 617-488-3273 | (C) 781-724-2908
stephen.rogers@bfim.com | www.bfim.com

From: Brad Queener [mailto:brad@bradleydevelopers.com]

Sent: Thursday, October 04, 2018 3:23 PM

To: Stephen Rogers < Stephen.Rogers@bfim.com>

Subject: Re: Fern Hall

Sounds good. Thank you.

On Oct 4, 2018, at 3:21 PM, Stephen Rogers < Stephen.Rogers@bfim.com > wrote:

Brad,

Thank you for your response, including Carrie's assessment. I need a few days. I need to discuss internally and with counsel. Thank you for your patience.

Regards, Steve

Stephen Rogers | First Vice President | Capital Transactions Boston Financial Investment Management, LP | 101 Arch Street | Boston, MA 02110 (P) 617-488-3273 | (C) 781-724-2908

stephen.rogers@bfim.com | www.bfim.com

From: Brad Queener [mailto:brad@bradleydevelopers.com]

Sent: Wednesday, October 03, 2018 3:13 PM **To:** Stephen Rogers < Stephen.Rogers@bfim.com > **Cc:** Brad Queener < brad@bradleydevelopers.com >

Subject: Fwd: Fern Hall

Stephen -

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Hope all is well with you. I have spoken with my attorney (see below) and we believe that the position the BF is taking is incorrect and are confident that we would prevail legally if forced to do so. As I mentioned on our call, it is my hope that we can avoid this. Look forward to speaking with you on this, let me know when you are available to discuss.

Thanks. Brad

Begin forwarded message:

From: "Scogin, Carolyn W." <CWS@blancolaw.com> Subject: Fern Hall

Date: October 2, 2018 at 5:09:15 PM EDT

To: 'Brad Queener'

<brad@bradleydevelopers.com>

Brad, following up on our conversation, I understand BF is taking the position that capital accounts come into play with calculation of the purchase price of the investor interest on Fern Hall. That is not correct. Under the Fern Hall OPA, the value of the investor's interest would be calculated based on the "Capital Transaction" waterfall, not liquidation. The language in Fern Hall is the same language favorable to the managing member that BF sought to "clarify" when you sold your interest in Planation Apartments. As you know, the purchaser of your interest in Plantation Apartments did not accept BF's proposed amendment to modify the back-end provisions (because the OPA language, same as language in Fern Hall, was beneficial to the managing member). Fern Hall also has identical language to several of the projects that you have discussed with David Douglas and Drew Schaumber, and that have been reviewed by David Davenport. If you are unable to reach an agreement on a purchase price with BF, next step will be to bring in Davenport to proceed to enforce your rights under the OPA. Please let me know if you have any additional questions at this point. Thanks.

Coase 1:28 CV 12486 DEW DOGUMENT THE O 1242 00 18 PARE & 6 62

Carolyn W. Scogin Attorney at Law cws@blancolaw.com

Bio | vCard

Main: 336.293.9000 Direct: 336.293.9063 Mobile: 336.918.6815 Fax: 336.293.9030

P.O. Drawer 25008 • Winston-Salem • NC • 27114-5008 110 South Stratford Road, Suite 500 • Winston-Salem • NC • 27104-4299

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Page 1

Volume I Pages 1 to 161 Exhibits 30 to 47

UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

BRADLEY-FERN HALL I, LLC,
Plaintiff,

vs. : C.A. No.

: 1:19-cv-11181-DPW

MMA FERN HALL CROSSING LLC, and BFIM SPECIAL LIMITED PARTNER, INC.,

Defendants.

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DEPOSITION OF MMA FERN HALL CROSSING LLC, THROUGH ITS DESIGNEE STEPHEN ROGERS, AND STEPHEN ROGERS INDIVIDUALLY, a witness called by counsel for the Plaintiff, taken pursuant to the Federal Rules of Civil Procedure, before Ken A. DiFraia, Registered Professional Reporter and Notary Public in and for the Commonwealth of Massachusetts, at the Offices of Burns & Levinson LLP, 125 High Street, Boston, Massachusetts, on Friday, March 13, 2020, commencing at 9:30 a.m.

PRESENT:

Winthrop & Weinstine, P.A.

(by David A. Davenport, Esq.)

225 South 6th Street, Suite 3500,

Minneapolis, MN 55402,

ddavenport@winthrop.com

612.604.6716

for the Plaintiff.

(Continued on Next Page)

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| | Page 5 | | Page 6 |
| 1 | E X H I B I T S, Continued NO. DESCRIPTION PAGE | 1 | PROCEEDINGS |
| 2 | Exhibit 43 Copy of spreadsheet analysis 134 | 2 | MS. FRIEDMAN: The same stipulations that |
| | labeled "Capital Transactions | 3 | we have agreed to? |
| 4 | Committee Presentation," for Fund ITC 32, Bates | 4 | MR. DAVENPORT: Yes, the same stipulations. |
| 5 | Nos. BFIM005181-005187 | 5 | STEPHEN ROGERS |
| 6 | Exhibit 44 Copy of Buyout Notice 152 | 6 | a witness called for examination by counsel for the |
| 7 | concerning Laurel Oaks from
Douglas Company | 7 | Plaintiff, having been satisfactorily identified by |
| 8 | Exhibit 45 Copy of Buyout Notice 153 | 8 | the production of his driver's license and being |
| 0 | concerning Magnolia Place | 9 | first duly sworn by the Notary Public, was examined |
| 9 | Apartments LP from Douglas
Company | 10 | and testified as follows: |
| 10 | Company | 11 | DIRECT EXAMINATION |
| 1.1 | Exhibit 46 Copy of Buyout Notice 154 | 12 | BY MR. DAVENPORT: |
| 11 | concerning Wellington Senior Apartments from Douglas Company | 13 | Q. Sir, could you state your name for the |
| 12 | | 14 | record. |
| 13 | Exhibit 47 Copy of email exchange between 154
Stephen Rogers and Drew | 15 | A. Stephen Rogers. |
| 13 | Stepnen Rogers and Drew
Schaumber regarding Oaks of | 16 | Q. And what is your address? |
| 14 | Wellington | 17 | A. 45 Ivy Road in Weymouth, Mass. |
| 15
16 | * * * * | 18 | Q. Where do you work? |
| 17 | | 19 | A. Boston Financial Investment Management. |
| 18 | | 20 | Q. Have you ever been deposed before? |
| 19
20 | | 21 | A. I have not. |
| 21 | | 22 | Q. You were here throughout the deposition |
| 22
23 | | 23 | yesterday, right? |
| 24 | | 24 | A. Correct. |
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| | Page 7 | | Page 8 |
| 1 | Q. So it generally works the same way. I will | 1 | A. No. |
| 2 | be asking you a series of questions throughout the | 2 | Q. Do you go by Steve or Stephen, or both? |
| 3 | day. If you answer, we will assume that you | 3 | A. Steve is fine. |
| 4 | understood the question when you answered it; is | 4 | Q. I will try to call you "Mr. Rogers." |
| | 1 010 | | |
| 5 | that fair? | 5 | A. Some folks call me "Captain America." |
| 5
6 | that fair? A. That's fair. | 5
6 | A. Some folks call me "Captain America." (Discussion off the record) |
| | A. That's fair.Q. And you probably know this. Oftentimes | | A. Some folks call me "Captain America." (Discussion off the record) Q. How long have you been employed at Boston |
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8 | A. That's fair.Q. And you probably know this. Oftentimes when I ask a question, I may be looking out the | 6
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8 | A. Some folks call me "Captain America." (Discussion off the record) Q. How long have you been employed at Boston Financial Investment Management? |
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9 | A. Some folks call me "Captain America." (Discussion off the record) Q. How long have you been employed at Boston Financial Investment Management? A. Just over 15 years. |
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8 | A. That's fair. Q. And you probably know this. Oftentimes when I ask a question, I may be looking out the window, looking down or taking notes and not looking at you. I don't mean any disrespect, okay? | 6
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11 | A. Some folks call me "Captain America." (Discussion off the record) Q. How long have you been employed at Boston Financial Investment Management? A. Just over 15 years. Q. What is your title? A. First vice president. |
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12 | A. Some folks call me "Captain America." (Discussion off the record) Q. How long have you been employed at Boston Financial Investment Management? A. Just over 15 years. Q. What is your title? A. First vice president. Q. Just vice president, or is it affiliated |
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13 | A. Some folks call me "Captain America." (Discussion off the record) Q. How long have you been employed at Boston Financial Investment Management? A. Just over 15 years. Q. What is your title? A. First vice president. Q. Just vice president, or is it affiliated with a department? |
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13 | A. Some folks call me "Captain America." (Discussion off the record) Q. How long have you been employed at Boston Financial Investment Management? A. Just over 15 years. Q. What is your title? A. First vice president. Q. Just vice president, or is it affiliated with a department? A. Yes. So I work in the capital transactions |
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14 | A. That's fair. Q. And you probably know this. Oftentimes when I ask a question, I may be looking out the window, looking down or taking notes and not looking at you. I don't mean any disrespect, okay? A. Sure. Q. If you need to take a break, let me know. We will try to get to a natural stopping point and let you do that. What did you do to prepare for the | 6
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14 | A. Some folks call me "Captain America." (Discussion off the record) Q. How long have you been employed at Boston Financial Investment Management? A. Just over 15 years. Q. What is your title? A. First vice president. Q. Just vice president, or is it affiliated with a department? A. Yes. So I work in the capital transactions group as a dispositions specialist. |
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15 | A. That's fair. Q. And you probably know this. Oftentimes when I ask a question, I may be looking out the window, looking down or taking notes and not looking at you. I don't mean any disrespect, okay? A. Sure. Q. If you need to take a break, let me know. We will try to get to a natural stopping point and let you do that. What did you do to prepare for the deposition today? | 6
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Page 9 Page 10 1 Q. Prior to that, what was your role at Boston 1 section of the department specific to guaranteed 2 Financial Investment Management? 2 funds. So the properties that I would look at were 3 A. I was a fund manager. 3 earmarked for guaranteed funds. 4 Q. How long were you a fund manager? 4 Q. What is a guaranteed fund? 5 A. The same, five years. 5 A. So it's very similar to the fund structure 6 Q. Prior to that, what was your role at Boston 6 that we were talking about yesterday as it relates 7 7 to ITC 32, but then we would guarantee the return or 8 A. I was in the production department or 8 guarantee the yield to the investor. 9 syndication department. Investor relations. 9 Q. So similar structure to a LIHTC investment 10 Q. How long were you in that role? 10 fund but different investments? 11 A. That was five years as well. 11 A. Well, same investment, same project 12 Q. So you've been in the capital transactions 12 partnership type investments, but for one reason or 13 group about five years? 13 another they may have been better suited for a 14 A. Correct. 14 guaranteed fund, so they were placed in a guaranteed 15 Q. So is it time to move to a different group 15 fund as opposed to an unguaranteed multi-investor 16 now? You do it every five years? 16 ITC 32 fund. 17 Talk to me about the production department, 17 Q. So ITC 32 is not a guaranteed fund, 18 syndication, investor relations. What generally 18 correct? 19 does that involve? 19 A. Correct. 20 A. So that involves -- the side of the 20 Q. Prior to working at Boston Financial 21 department I worked on involves identifying 21 Investment Management, where were you employed? 22 investors for these investments and then compiling 22 A. A group called KBS Realty Advisors. 23 properties or investments sufficient for a 23 Q. Is that here in the Boston area? 24 particular fund. So I worked in a department or 24 A. It was. It's no longer. It was a Newport Page 11 Page 12 A. Correct. Beach, California based company with an office in 1 1 2 2 Q. And then when Boston Financial acquired the Boston. That Boston office is no longer here. 3 Q. Did it somehow become affiliated with 3 assets of MMA Financial, you then became an employee of Boston Financial; is that right? 4 **Boston Financial Investment Management?** 4 5 5 A. No. A. Correct. 6 Q. So roughly 2009? I think you said 2009, 6 O. Did it shut down? 7 7 right? A. No. It was a conventional real estate 8 group. It worked on completely different investment 8 A. Yes. 9 types. I just max-ed out. I was beyond my 9 Q. Okay. Got it. When Fund 32 was being 10 10 formed, were you involved? five-year period, so... 11 Q. So you basically left your employment there 11 12 12 to join Boston Financial? Q. Were you involved in any of the syndication relating to Fund 32? 13 A. Yes. 13 14 A. I was not. 14 Q. You never worked for MMA Financial; is that 15 15 Q. Fund 32, was it fully capitalized by the right? 16 time you had any involvement with it? 16 A. No. I did work for MMA Financial because 17 Boston Financial purchased the investments of MMA 17 MS. FRIEDMAN: Objection. 18 Financial back in 2009. I started my employment 18 A. So I don't have direct involvement in 19 with its predecessor, MMA Financial, in 2005. 19 ITC 32. I have involvement in the project 2.0 20 partnerships that ITC 32 is invested in. Q. So BFIM acquired MMA Financial in 2009? 21 A. BFIM acquired the assets of MMA Financial 21 Q. When did that involvement with those 22 project partnerships in Fund 32 begin? 2.2 in 2009, correct. 23 Q. So in 2005 roughly, is that when you 23 A. So in my role in capital transactions, from 24 started working at MMA Financial? 24 memory, I'm going to say that Fern Hall is likely

| | Page 13 | | Page 14 |
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| 1 | the first investment in ITC 32 that I've been | 1 | A. Correct. |
| 2 | involved in. | 2 | Q. And at or about that time, that's when you |
| 3 | Q. Got it. So you were a fund manager. Did | 3 | first had involvement with Fern Hall? |
| 4 | you manage Fund 32? | 4 | A. No. |
| 5 | A. I did not. | 5 | Q. When did you first have involvement with |
| 6 | Q. What did you do as a fund manager? | 6 | Fern Hall? |
| 7 | A. So as a fund manager, my primary | 7 | A. Probably in the 2017, 2018 range. |
| 8 | responsibility was providing reports to investors, | 8 | Q. So a couple of years or so after you began |
| 9 | essentially basically managing the benefits of the | 9 | working in the capital transactions group? |
| 10 | fund, then communicating fund performance to the | 10 | A. Yes. |
| 11 | investors. | 11 | Q. Is that because you were assigned to work |
| 12 | Q. And fund benefits include tax credits? | 12 | on Fund 32 related transactions for project |
| 13 | A. Correct. | 13 | partnerships that are nearing Year 15? |
| 14 | Q. Allocation of losses? | 14 | A. Not exactly. |
| 15 | A. Yes. | 15 | Q. How was it that you came to have |
| 16 | Q. And to the extent there's cash being | 16 | involvement with Fern Hall? |
| 17 | distributed, is that also one of the benefits of the | 17 | A. So properties are assigned to a |
| 18 | fund? | 18 | dispositions specialist by the department manager. |
| 19 | A. Yes. | 19 | Q. So it's not the case that you are |
| 20 | Q. So understanding that you didn't manage | 20 | responsible for all of the properties within |
| 21 | Fund 32, did you manage funds like it? | 21 | Fund 32? |
| 22 | A. Yes. | 22 | A. Correct. |
| 23 | Q. So you began working in the capital | 23 | Q. Who was it that assigned you the |
| 24 | transactions group around 2015; is that right? | 24 | responsibility to work on matters related to Fern |
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Page 17 Page 18 1 prior to the end of the 10-year credit period? 1 A. At times. 2 A. Can I qualify that answer? 2 Q. Is it generally the case that limited 3 O. Sure. 3 partners prefer not to withdraw prior to the end of 4 A. Not normally, but currently it's happening. 4 the compliance period? 5 And I say that because recent in transactions 5 A. Can you repeat the question. 6 general partners are inserting put options in 6 Q. Is it generally the case that limited 7 Year 11, so there are times I would be assigned to a 7 partners prefer not to withdraw prior to the end of 8 8 property prior to Year 10 in preparation of that the compliance period? 9 9 MS. FRIEDMAN: Objection. 10 10 Q. So with respect to fund project A. I don't think that's a preference any longer. 11 partnerships like the vintage of Fern Hall where Q. Was it once a preference? 11 12 there's no put option, would it generally be the A. I don't know if it was a preference. It 12 13 case that you are assigned to work on those after 13 wasn't a practice as it is today. 14 14 the end of the 10-year credit period? Q. Understanding that distinction you just 15 A. Yes. 15 made as far as a change in practice, how long ago 16 16 did that change? Q. What is the general role of the 17 dispositions group? 17 A. So I'm going to say about, say, 2016, 2017 18 A. So the role is to manage and execute a 18 is the time frame where we started exiting 19 limited partner's withdrawal from a local 19 partnerships prior to the end of Year 15 and 20 20 partnership, from a project partnership. investors became comfortable with that. 21 Q. Is it generally the case that in that role 21 Q. How many dispositions on average do you 22 limited partners desire their withdrawal from a 22 think you execute in a given year? Let's use 2019 23 partnership in Year 16? 23 as an example. 24 MS. FRIEDMAN: Objection. 24 A. Okay. 12 to 15. Page 19 Page 20 Q. Is that roughly the same estimate you would 1 1 credits. They receive those tax credits over a period of ten years. So if they were to withdraw 2 give for 2018? 2 3 A. Yes. 3 from a partnership before Year 15, they are at risk 4 4 Q. If you execute a limited partner withdrawal of recapture, and nobody wants to receive that 5 5 from a project partnership prior to the end of the notice from the IRS. 6 6 compliance period, are there certain protections Q. And after the end of the compliance period, 7 7 is that risk of recapture gone? that you would like to have in place for the limited 8 partner? 8 A. Yes. 9 A. Yes. 9 Q. What do you understand recapture to be? 10 Q. What are they? 10 A. I understand recapture to be a penalty, if 11 A. We require a post transfer compliance 11 you will, an investor essentially refunding the 12 guarantee. 12 Government the tax credits that they received if their project falls out of compliance. 13 Q. What is that? 13 14 Q. And if the project falls out of compliance 14 A. So we are requiring, or we require, a 15 guarantee against the recapture of credits. 15 after the end of the 15-year compliance period, is 16 16 it your understanding then that the IRS would not be Q. Anything else other than requiring that 17 post transfer compliance guarantee? 17 able to come in and effect a recapture? 18 18 A. No. A. It's my understanding that there is a 19 Q. Is that essentially a guarantee that 19 three-year audit window, if you will. 20 20 protects the limited partner in the event of a Q. What is that? 21 recapture? 21 A. So the IRS has an ability to examine the 22 books and records within the past three years, and 22 A. Yes. 23 Q. Why would that be important? 23 if they were to audit the property's books and 24 A. Because the investors purchased tax 24 determined that that that property was out of

| | Page 53 | | Page 54 |
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| 1 | that. | 1 | you see that? |
| 2 | Q. And that ultimately results in the sale of | 2 | A. I do. |
| 3 | the property? | 3 | Q. Can you read what that says? |
| 4 | A. Yes. | 4 | A. It says, "Net residual proceeds to fund |
| 5 | Q. And a disposition is either a fee simple | 5 | from fund management residual proceeds analysis," |
| 6 | sale of the project or a sale of the limited partner | 6 | and in the parenthesis it says, "performed," and |
| 7 | interests in the partnership, correct? | 7 | does that say 6? Is it dash 06? I don't know. I |
| 8 | A. Yes. | 8 | can't tell. |
| 9 | Q. So one of those events back in 2009 was | 9 | Q. Is it 605? |
| 10 | projected to occur two years after what the | 10 | A. I don't know. |
| 11 | compliance period was identified here? | 11 | O. It's hard to tell? |
| 12 | A. Correct. | 12 | A. It is hard to tell. |
| 13 | Q. And then the net projected residual | 13 | Q. Is it fair to say that the footnote is |
| 14 | proceeds to the fund, that would be what was | 14 | referencing some residual proceeds analysis that was |
| 15 | projected at that time to follow whatever the | 15 | performed that identified zero dollars of net |
| 16 | disposition might be, correct? | 16 | projected residual proceeds? |
| 17 | A. Correct. | 17 | MS. FRIEDMAN: Objection. |
| 18 | Q. Whether it was a sale of the project or a | 18 | A. Yes. |
| 19 | transfer of the limited partner interest in the | 19 | Q. On the next page, you will see more |
| 20 | partnership, the net projected residual proceeds to | 20 | information relating to Fern Hall? |
| 21 | the fund was zero dollars, right? | 21 | A. Uh-huh. |
| 22 | A. Correct. | 22 | Q. There's a column Cumulative Received, do |
| 23 | Q. And there's a Footnote No. 3 associated | 23 | you see that? |
| 24 | with net projected residual proceeds to the fund, do | 24 | A. I see it, yes. |
| | | | 11. 1 500 1t, yes. |
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| | Page 73 | | Page 74 |
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| 1 | A. Yes, it is. | 1 | ratings for where the proceeds are coming from. I |
| 2 | Q. We can go back and look at this spreadsheet | 2 | have given you three. PNSP, TCB, WF, and then the |
| 3 | (indicating). It's similar to the one we just | 3 | final one would be CTT. That would be an override |
| 4 | looked at, but it's just for a different year, | 4 | by a capital transactions dispositions person. |
| 5 | right, prepared roughly a year later? | 5 | Q. So this spreadsheet is projecting a |
| 6 | A. It does have similar information on it, yes. | 6 | potential disposition of the project, the Fern Hall |
| 7 | Q. So Page 8921 shows proceeds to fund source, | 7 | project, in 2020, correct? |
| 8 | right? | 8 | A. That's correct. |
| 9 | A. Yes. | 9 | Q. And it's projecting if these circumstances |
| 10 | Q. And for Fern Hall on the next page, it | 10 | occur at that time, the projected positive capital |
| 11 | says, "PNSP," right? | 11 | account of the limited partner would be \$747,970, |
| 12 | A. It does. | 12 | right? |
| 13 | Q. Is that essentially a link that you click | 13 | A. That's right. |
| 14 | on, PNSP, and it takes you to another screen? | 14 | Q. And then it's projecting if the disposition |
| 15 | A. No. So similar to the ratings we talked | 15 | occurred in 2020, the potential net sales proceeds |
| 16 | about briefly for Properties A through D, so Prism | 16 | would be \$267,873, correct? |
| 17 | has this sort of, for lack of a better term, rating | 17 | A. That's correct. |
| 18 | system, and it does a calculation or a lookup, if | 18 | Q. And it is also projecting if that were to |
| 19 | you will, of various amounts in various columns, | 19 | occur, proceeds to the fund via the Fern Hall |
| 20 | measures those amounts against one another and | 20 | Partnership Agreement would result in \$25,777 in |
| 21 | determines what the source of proceeds to the fund | 21 | proceeds to the fund, right? |
| 22 | is going to be. That source would be either PNSP, | 22 | MS. FRIEDMAN: Objection. |
| 23 | as you see here, tax capital balance, or TCB, and | 23 | A. Could you rephrase that. |
| 24 | then the waterfall, WF. So essentially there's four | 24 | Q. Sure. We are looking at Proceeds to Fund |
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| 1 | | 1 | Page 76 |
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21 | via Waterfall, right? A. I see that, yes. Q. So if there is a disposition in 2020, based on the circumstances modeled here, the proceeds to the fund via the waterfall would be 25,777, correct? MS. FRIEDMAN: Objection. A. The calculated amount in Prism of the waterfall value is 25,777, but that is not what is projected to come up from this property. Q. Understood, but in terms of what would be coming the waterfall, it's \$25,000? MS. FRIEDMAN: Objection. A. Correct. Q. And that is referencing the waterfall in the Fern Hall Apartment the Fern Hall Partnership Agreement, right? A. That's correct. Q. Similar to the exhibit we just looked at for Exhibit 32 when it said, "via the waterfall," it's referring specifically to the Fern Hall Project Partnership Agreement, right? | 2
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21 | A. That's correct. Q. And that waterfall is 10.1B of the Fern Hall Partnership Agreement, correct? A. That is correct. Q. This calculates that the proceeds available from a sale would be 267,873, which is also short of the capital account projected at that time, correct? A. That's correct. Q. Very similarly to the circumstances projected in Exhibit 32? A. That's right. Q. And then the projected net sorry. The potential net sales proceeds to the fund that is modeled is 267,873, right? A. Correct. Q. And that doesn't bring the capital account projected balance to zero, does it? A. It does not. Q. It would leave it short by almost \$500,000, right? A. That's right. |
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Page 77 Page 78 MS. FRIEDMAN: Objection. 1 1 correct? 2 Q. I'll restate it. If you apply the 267 to 2 A. Correct. 3 3 the 747,970, that leaves a positive capital account Q. And the Fern Hall Limited Partnership could 4 for the limited partner in the Fern Hall 4 allocate that \$725,000 loss to the limited partner, 5 5 Partnership, correct? correct? 6 A. Correct. 6 A. Correct. 7 7 Q. And then that positive capital account O. And the fund would then write that down to 8 8 would be written off under these circumstances if zero and receive the tax benefit, correct? 9 they occurred, correct? 9 A. They would receive a tax benefit from that 10 MS. FRIEDMAN: Objection. 10 write-off, that's correct. 11 A. The fund would receive on its K-1 from the 11 Q. Who makes the decision in preparing these 12 12 Fern Hall partnership a loss on sale, if you will, reports to assume that the proceeds would be 13 or a taxable loss of that 500,000. 13 267 rather than 25,000? 14 Q. Which effectively is writing it down to 14 A. So in this report dated 2014, so right now 15 15 zero, right? it is simply the Prism system, if you will, that is 16 MS. FRIEDMAN: Objection. 16 calculating those numbers. As I mentioned, because 17 17 A. Correct. of -- there's a rating system, again, if you will. 18 Q. Now, it's true, isn't it, that you could 18 Prism recognizes that there's a positive capital 19 receive \$25,777 rather than \$267,873, right? 19 account balance compared to what is available for 20 MS. FRIEDMAN: Objection. 20 potential net sales proceeds. It targets this as 21 A. If that was the terms of the agreement, yes. 21 potential net sales proceeds as the source, which 2.2 Q. And if the terms of the agreement resulted 22 means that the entire net sales proceeds will come 23 23 in those circumstances, the projected positive to the limited partner because of that positive 2.4 capital account would be roughly \$725,000 remaining, 24 capital account. Page 79 Page 80 1 Q. Why, if you know, does Prism assume that 1 waterfall to determine what the source is, if any 2 the entire net proceeds from sale would go to the 2 proceeds are coming up to the fund. So what comes 3 limited partner rather than the proceeds via the 3 up to the fund could be -- you know, just looking 4 4 waterfall? here, it could be one of these three columns. 5 5 A. Because, generally speaking, the Q. So essentially Prism is modeling "This is 6 6 partnership rules are, specifically under 704B, that what we think the capital account will look like in 7 7 the year in which we anticipate a disposition"; is the limited partner receives its positive capital 8 account back at the end of the deal, at the end of 8 that right? 9 the -- when the interest is disposed of. 9 MS. FRIEDMAN: Objection. 10 Q. Prism is making that determination? 10 A. Correct. 11 A. Prism is not making that determination. We 11 Q. It's also modeling, "If there happens to be 12 as a company have an understanding of how the 12 a sale of the apartment complex or the project, this 13 partnership rules are applied at the Lower Tier 13 is what we project might come to us via that sale 14 14 level. As a result, we have built Prism to model under a dissolution of the partnership and a return 15 15 of positive capital accounts," correct? essentially those rules. 16 16 MS. FRIEDMAN: Objection. Q. Why, then, if there's a positive capital 17 account would you as a company model a distribution 17 A. Under a capital transaction that results in 18 of proceeds via the waterfall if there's a positive 18 liquidation and dissolution, yes. 19 capital account? 19 Q. So the potential net sales proceeds column 20 20 A. So we calculate all of the potential is reflecting a capital transaction that results in 21 sources, potential net sales proceeds, the tax 21 a dissolution of the partnership and liquidation of 22 22 capital balance, and the waterfall. There are its assets, correct? 23 instances where a property will not have a positive 23 A. The 267 is simply the calculation of the 24 capital account, and so we look to then the 24 net sales proceeds of that project. So in a sale

Page 81 Page 82 1 environment, yes. In a sales event. 1 Q. And if the loss allocation that comes to 2 2 Q. So in the event of the sale of the the fund is \$525,000, those losses flow through 3 apartment complex, right? 3 99.99 percent to the investors in the fund, the 4 A. Correct. 4 limited partners in the fund, right? 5 Q. And the proceeds to the fund via the 5 A. They do. 6 waterfall is also modeling a sale of the apartment 6 Q. And if there is \$25,000 of cash that comes 7 complex, correct? 7 into the fund, the general partner will receive some 8 A. Correct. 8 portion of that cash, correct? 9 Q. So the potential net sales proceeds is --9 A. So that cash will come into the fund, and 10 10 then the fund manager will determine what happens 11 The proceeds to the fund via the waterfall 11 with that cash. 12 is the -- I already asked that question. Never mind. 12 Q. It will go to pay operating expenses 13 Under these circumstances, if they were to 13 potentially, right? 14 occur in 2020, as modeled, neither the distribution 14 A. Yes, potentially. 15 of proceeds via the waterfall or potential net sales 15 Q. It could potentially be used to pay 16 proceeds brings the capital account to zero, does it? 16 deferred asset management fees due to BFIM, correct? 17 A. It does not. 17 A. Could be, yes. 18 Q. And in both instances -- pick one and apply Q. And if the cash coming into the fund is 18 19 it each time -- the capital account balance will 19 \$267,000, there's more money available to pay 20 remain positive and be written off, correct? 20 operating expenses, right? 21 MS. FRIEDMAN: Objection. 21 A. There would be more money coming into the 22 A. The fund will receive a loss in the amount 22 fund, yes. 23 of the difference, which will write the capital 23 Q. To pay operating expenses, right? 24 account to zero. 2.4 A. Yes. Page 83 Page 84 Q. To pay deferred asset management fees due 1 than the loss allocation, correct? 1 2 to BFIM, correct? 2 A. To Boston Financial? 3 3 Q. Yes, to the general partner in the fund, A. Correct. 4 Q. So the more cash that comes in, the more 4 the Boston Financial affiliate. 5 5 beneficial it is to the general partner of the fund MS. FRIEDMAN: Objection. 6 when you compare it to the loss allocations that 6 A. More cash provides for more sources to pay 7 7 come to the fund, correct? fund level expenses. 8 MS. FRIEDMAN: Objection. 8 Q. And that includes payments to Boston 9 A. Well, it's more beneficial to the partners 9 Financial Investment Management, correct? 10 of the fund. I mean, there's nothing that says that 10 A. That may include payments to Boston 11 that cash is not going to make its way to the 11 Financial for deferred asset management fees, correct. 12 investors, depending on the dynamics of the fund. 12 Q. The Potential Net Sales Proceeds column, 13 Q. The fund manager, BFIM, will make those 13 you would agree with me that that's not identifying 14 determinations, right? 14 any waterfall provision within the Fern Hall 15 A. Within the parameters of the fund 15 Partnership Agreement, right? 16 16 A. So are we still referring to Page 8994 to -agreement, correct. 17 Q. But there really are no determinations to 17 Q. Yes, sir. Well, it's really 8922 with the 18 heading Potential Net Sales Proceeds, do you see 18 be made when it comes to the allocation of losses 19 because they just flow through automatically to the 19 that? 20 20 investor at 99.99 percent, correct? A. I do. Sure. 21 MS. FRIEDMAN: Objection. 21 Q. That's not pulling from some waterfall in a 22 22 partnership agreement, is it? A. That's correct. 23 Q. So a cash event at the Upper Tier results 23 A. It is not. in a potential greater economic advantage for BFIM 24 24 Q. These spreadsheets, they are updated

| | Page 89 | | Page 90 |
|--|---|--|---|
| 1 | A. I do. | 1 | Limitation Screen Status 8/21/14, Excel spreadsheet, |
| 2 | Q. Why? | 2 | do you see that? |
| 3 | A. So Epicor starts with our beginning equity | 3 | A. I do. |
| 4 | balance of 2,010,000 that we put into the that | 4 | Q. What is this document? |
| 5 | the fund excuse me put into the project | 5 | A. It has been significantly redacted. |
| 6 | partnership. That 2,010,000 is being reduced by | 6 | Q. I mean, there's essentially nothing in here |
| 7 | cash distributions and tax losses. So the fund | 7 | other than the headings for something called "Jeff's |
| 8 | stepped into this partnership, stepped into the | 8 | Fund Plan List." What is this? |
| 9 | shoes of an existing excuse me exiting partner | 9 | A. Okay. So this is a screen within Prism |
| 10 | and received a capital account that was less than | 10 | titled "Disposition Limitations." So when a |
| 11 | the full amount of money that the fund put into the | 11 | property is assigned to a capital transactions |
| 12 | project. So we are recognizing here that there's a | 12 | person, it is their responsibility to read through |
| 13 | difference in those two numbers. | 13 | the various documents, understand the provisions |
| 14 | Q. And that distribution is reflected on the | 14 | specific to the exit from the partnership and |
| 15 | last page, 4473, of roughly \$430,000? | 15 | identify any limitations to that ability to exit the |
| 16 | A. That's correct. | 16 | partnership. So what this report tells me right now |
| 17 | Q. Is there any significance to this | 17 | is that in 2014, there were no limitations |
| 18 | discrepancy? Does it mean anything to this lawsuit? | 18 | identified for the Fern Hall project partnership. |
| 19 | MS. FRIEDMAN: Objection. | 19 | Q. Which is why it doesn't appear here because |
| 20 | A. No. | 20 | there would only be properties identified that had |
| 21 | (Document marked as Rogers | 21 | limitations? |
| 22 | Exhibit 36 for identification) | 22 | MS. FRIEDMAN: Objection. |
| 23 | Q. Exhibit 36, the Control number is BFIM9032 | 23 | Q. Is that right? |
| 24 | and ending in 9217. The date created is 8/31/14. | 24 | A. That either a) they had limitations; |
| | Page 91 | | Page 92 |
| 1 | b) that not necessarily that they had imitations, | 1 | Q. But does he have any ownership interests in |
| 2 | but that the limitations screen had been populated. | 2 | the fund? |
| 3 | MS. FRIEDMAN: Objection. Can we go off | 3 | MS. FRIEDMAN: Objection. |
| 4 | the record for just a second? | 4 | Q. Any of the funds, if you know. |
| 5 | MR. DAVENPORT: Sure. | 5 | A. It is doubtful that Ken Cutillo has |
| 6 | (Discussion off the record) | 6 | ownership interests in any of the funds that remain |
| 7 | MR. DAVENPORT: We were just talking about | 7 | with Boston Financial at this time. |
| 8 | Exhibit 36. Ms. Friedman is just going to check to | 8 | Q. Do you know if when he left Boston |
| 9 | see if there was a technical error with the | 9 | Financial, he took any ownership in funds with him? |
| 10 | redactions and maybe perhaps Fern Hall might be in | 10 | MS. FRIEDMAN: Objection. |
| | | | |
| 11 | this spreadsheet, or not. She will let us know. | 11 | A. When Orix purchased Boston Financial, prior |
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12 | Q. Why is it called "Jeff's Fund Plan List"? | 11
12 | owners took with them funds that Orix did not |
| | Q. Why is it called "Jeff's Fund Plan List"?A. So it used to be called Jeff's Fund Plan | 12
13 | owners took with them funds that Orix did not purchase for various reasons. |
| 12 | Q. Why is it called "Jeff's Fund Plan List"?A. So it used to be called Jeff's Fund PlanList, but now in Prism it's just referred to as the | 12
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17 | owners took with them funds that Orix did not purchase for various reasons. Q. Are there any funds that Orix did not purchase that Mr. Rahn has an ownership interest in, if you know? MS. FRIEDMAN: Objection. I don't know |
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21 | Q. Why is it called "Jeff's Fund Plan List"? A. So it used to be called Jeff's Fund Plan List, but now in Prism it's just referred to as the CTT Fund Plan. Q. Oh, is it because he was in charge of the A. He was the manager. Q. Do you know, does he have any ownership interest in any of the interests in this fund? A. I'm not aware that Jeff if Jeff has an ownership percentage in any of the funds. | 12
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21 | owners took with them funds that Orix did not purchase for various reasons. Q. Are there any funds that Orix did not purchase that Mr. Rahn has an ownership interest in, if you know? MS. FRIEDMAN: Objection. I don't know what the relevance of this is. A. I do not know. Q. When Orix acquired Boston Financial, did it acquire this fund? |
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| | Page 101 | | Page 102 |
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| 1 | A. Within Boston Financial? | 1 | folder? |
| 2 | Q. Yes, sir. | 2 | A. Typically, yes. |
| 3 | A. Yes. | 3 | Q. Did you ever have any email communications |
| 4 | Q. Who? | 4 | with Mr. Queener? |
| 5 | A. So if you are referring to, like, the IT | 5 | A. I did. |
| 6 | folks that I needed to help me source or search for | 6 | Q. How frequent was that? |
| 7 | emails within our system; is that what you are | 7 | A. It would be less than five times. |
| 8 | referring to when you say "help"? | 8 | Q. Total? |
| 9 | Q. Yes. You had some folks in IT help search | 9 | A. Total. |
| 10 | for electronic documents like emails and things? | 10 | Q. Did you ever have any email communications |
| 11 | A. Uh-huh. | 11 | with Mr. Queener relating to the value of the |
| 12 | Q. We have gone through a number of | 12 | limited partner interests in Fern Hall? |
| 13 | spreadsheets and documents contained in the three | 13 | A. Yes. |
| 14 | different types of databases which you identified, | 14 | Q. Do you recall when those communications |
| 15 | Epicor, and whatnot. Are there hard copy files that | 15 | were? |
| 16 | you keep that relate to Fern Hall? | 16 | A. So my first communication with Mr. Queener |
| 17 | A. Hard copies that I keep? | 17 | was verbal, and it was in sorry it was in |
| 18 | Q. Yes. | 18 | September of 2018. |
| 19 | A. There are not. They are all electronic. | 19 | Q. So no emails with him before September of |
| 20 | Q. So you have an email account at Boston | 20 | 2018? |
| 21 | Financial, right? | 21 | A. That is correct. |
| 22 | A. That's correct. | 22 | Q. What do you recall about the discussion |
| 23 | Q. And if you get an email relating to Fern | 23 | with Mr. Queener in September of 2018? |
| 24 | Hall, do you just drop it into a Fern Hall file | 24 | A. I recall it was an introductory phone |
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| | Page 103 | | Page 104 |
| | 5 | | rage 104 |
| 1 | conversation, two partners talking about Year 15 and | 1 | Mr. Queener voiced his displeasure, and then that |
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| | conversation, two partners talking about Year 15 and | | Mr. Queener voiced his displeasure, and then that |
| 2 | conversation, two partners talking about Year 15 and hoping to reach an amicable negotiated settlement. | 2 | Mr. Queener voiced his displeasure, and then that was basically the substance of the phone conversation. |
| 2 | conversation, two partners talking about Year 15 and hoping to reach an amicable negotiated settlement. Q. Do you recall anything more about the | 2 | Mr. Queener voiced his displeasure, and then that was basically the substance of the phone conversation. Q. When you say he voiced his displeasure, was |
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6 | Mr. Queener voiced his displeasure, and then that was basically the substance of the phone conversation. Q. When you say he voiced his displeasure, was that directed toward or in response to you letting him know that Boston Financial valued the limited partners' interests based on a return of positive capital account? A. Yes. |
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7 | conversation, two partners talking about Year 15 and hoping to reach an amicable negotiated settlement. Q. Do you recall anything more about the conversation other than that description? A. I do. Q. What else do you recall? A. So we addressed the manner in which Boston | 2
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8 | conversation, two partners talking about Year 15 and hoping to reach an amicable negotiated settlement. Q. Do you recall anything more about the conversation other than that description? A. I do. Q. What else do you recall? A. So we addressed the manner in which Boston Financial values its interest and the expectation that Mr. Queener's buyout price would need to | 2
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9 | Mr. Queener voiced his displeasure, and then that was basically the substance of the phone conversation. Q. When you say he voiced his displeasure, was that directed toward or in response to you letting him know that Boston Financial valued the limited partners' interests based on a return of positive capital account? A. Yes. Q. Was he rude? |
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11 | conversation, two partners talking about Year 15 and hoping to reach an amicable negotiated settlement. Q. Do you recall anything more about the conversation other than that description? A. I do. Q. What else do you recall? A. So we addressed the manner in which Boston Financial values its interest and the expectation that Mr. Queener's buyout price would need to include the capital account. Q. Did you direct Mr. Queener to any provision within the Fern Hall Partnership Agreement that supported him needing to do that? A. I don't recall us discussing the | 2
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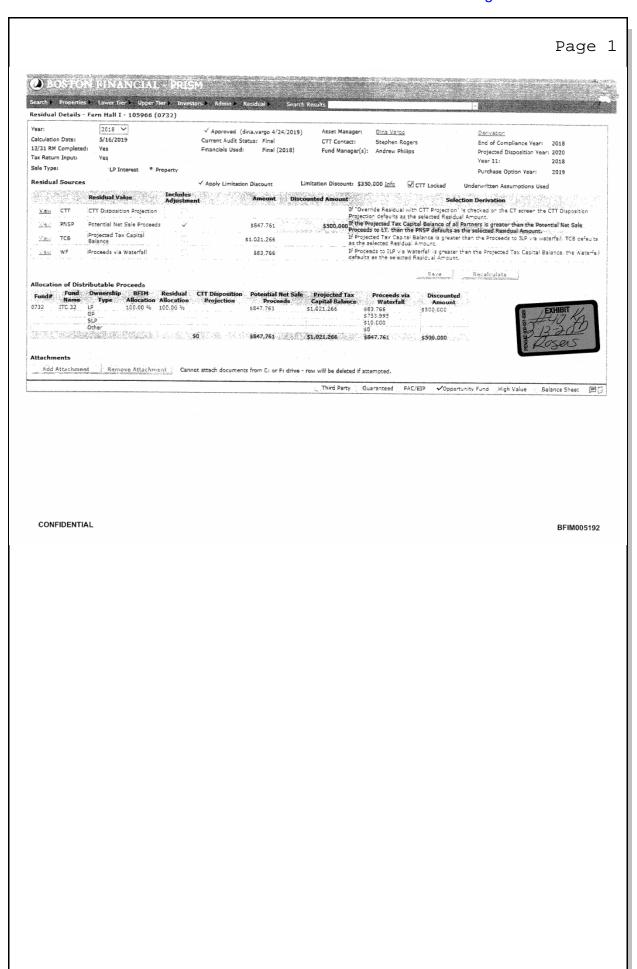
| | Page 109 | | Page 110 |
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| 1 | are identified in it is generated for purposes of | 1 | CohnReznick provides, correct? |
| 2 | providing it to CohnReznick so they can do their | 2 | A. Correct. |
| 3 | peer review? | 3 | Q. And Boston Financial's relationship with |
| 4 | A. If that is what this schedule is for, then | 4 | Novogradak goes back at least 15 years, right? |
| 5 | yes. | 5 | MS. FRIEDMAN: Objection. |
| 6 | Q. Okay. Has CohnReznick provided any opinion | 6 | A. I assume that to be the case. |
| 7 | to Boston Financial relating to the Fern Hall | 7 | MS. FRIEDMAN: Doesn't assume. |
| 8 | capital account? | 8 | THE WITNESS: Okay. |
| 9 | MS. FRIEDMAN: Objection. | 9 | Q. You believe that to be the case based on |
| 10 | A. No. | 10 | your experience working at Boston Financial, right? |
| 11 | Q. You know who Novogradak is, right? | 11 | A. That's correct. |
| 12 | A. I do. | 12 | Q. Are there any other accounting firms that |
| 13 | Q. They are similar to CohnReznick in the | 13 | you are aware of that Boston Financial or its |
| 14 | sense of the business and services that they provide | 14 | affiliates have a relationship with other than |
| 15 | as you described CohnReznick provides, correct? | 15 | Novogradak and CohnReznick? |
| 16 | MS. FRIEDMAN: Objection. | 16 | A. I am aware that we engage Ernst & Young for |
| 17 | A. Yes. | 17 | the same services. |
| 18 | Q. Does Boston Financial receive services from | 18 | Q. Any others? |
| 19 | Novogradak? | 19 | A. There's at least one other. I do not know |
| 20 | A. We engage Novogradak for services, yes. | 20 | the name. |
| 21 | Q. When you engage Novogradak, what type of | 21 | Q. Have you ever heard of the group LIHTC |
| 22 | services are they engaged to provide? | 22 | Advisors? |
| 23 | A. Fund level audits and fund level tax returns. | 23 | A. I have not. |
| 24 | Q. Similar in scope to the services that | 24 | Q. Has Boston Financial engaged Novogradak to |
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| | rage iii | | Page 112 |
| 1 | provide any services relating to Fern Hall? | 1 | A. Ido. |
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| 22 MS. FRIEDMAN: Objection. 23 A. Could you repeat the question. 24 Q. Sure. The potential net sales proceeds 25 \$500,000 that would entitle the fund to \$500,000 of the potential net sales proceeds. 24 Q. Does the spreadsheet identify the capital | 2 | Page 113 | | Page 114 |
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| 2 A. Correct. 3 Q. There's a potential net sales proceeds, or 4 PNSP, as you identified it earlier, amount of 5 \$847,761, right? 6 A. Yes. 7 Q. And then there's an indication in the 8 allocation of distributable proceeds section on 9 Page 1 of Exhibit 40 of a discounted amount of 10 \$500,000, do you see that? 11 A. I do. 12 Q. Why is there a discounted amount? 13 A. So there's a discounted amount? 14 there has been additional analysis done before this 15 print schedule that determined that the projected 16 tax capital balance shown on this page is too high 17 and that once adjusted the amount of proceeds that 18 the fund would expect to receive would be closer to 19 \$500,000 as opposed to \$47,761. 20 Q. So the discounted amount assumes that the 21 847,761 was discounted by \$347,761? 22 MS. FRIEDMAN: Objection. 23 A. Could you repeat the question. 24 Q. Is there anything in the exhibit that you are aware of that would show us why or how the \$347,000 discounted amount, correct? 4 Q. Is there anything in the exhibit that you are aware of that would show us why or how the \$347,000 discount was determined? A. (Examines document) There's nothing in this exhibit. 9 Q. Based on Exhibit 40, the discounted amount of \$5500,000, is this exhibit suggesting that that is what Boston Financial thought the value of its interests were if applying the potential net sales proceeds analysis to the LP valuation? MS. FRIEDMAN: Objection. 15 A. Could you rephrase the question. Q. Sure. Does this suggest to you that the potential net sales proceeds would result in a \$500,000 purchase price for the LPs' interest? 19 MS. FRIEDMAN: Objection. 20 A. This suggests to me that there is a capital account balance of an amount near to or greater than \$500,000 that would entitle the fund to \$500,000 of the potential net sales proceeds. Q. Does the spreadsheet identify the capital | | proceeds, correct? | 1 | identified has been discounted by \$347,761 to get to |
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| the fund would expect to receive would be closer to 18 \$500,000 purchase price for the LPs' interest? 19 500,000 as opposed to 847,761. 20 Q. So the discounted amount assumes that the 21 847,761 was discounted by \$347,761? 22 MS. FRIEDMAN: Objection. 23 A. Could you repeat the question. 24 Q. Sure. The potential net sales proceeds 25 \$500,000 purchase price for the LPs' interest? 19 MS. FRIEDMAN: Objection. 20 A. This suggests to me that there is a capital account balance of an amount near to or greater than \$500,000 that would entitle the fund to \$500,000 of the potential net sales proceeds. 26 Q. Does the spreadsheet identify the capital | 16 | tax capital balance shown on this page is too high | 16 | Q. Sure. Does this suggest to you that the |
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| Q. So the discounted amount assumes that the 20 A. This suggests to me that there is a capital 21 847,761 was discounted by \$347,761? 22 MS. FRIEDMAN: Objection. 23 A. Could you repeat the question. 24 Q. Sure. The potential net sales proceeds 26 A. This suggests to me that there is a capital 27 account balance of an amount near to or greater than 28 \$500,000 that would entitle the fund to \$500,000 of 29 the potential net sales proceeds. 20 A. This suggests to me that there is a capital 21 account balance of an amount near to or greater than 22 \$500,000 that would entitle the fund to \$500,000 of 23 the potential net sales proceeds. 24 Q. Does the spreadsheet identify the capital | 18 | • | 18 | \$500,000 purchase price for the LPs' interest? |
| 21 847,761 was discounted by \$347,761? 22 MS. FRIEDMAN: Objection. 23 A. Could you repeat the question. 24 Q. Sure. The potential net sales proceeds 25 Ar. This suggests to the that there is a capital account balance of an amount near to or greater than 22 \$500,000 that would entitle the fund to \$500,000 of the potential net sales proceeds. 24 Q. Does the spreadsheet identify the capital | 19 | | 19 | MS. FRIEDMAN: Objection. |
| 22 MS. FRIEDMAN: Objection. 23 A. Could you repeat the question. 24 Q. Sure. The potential net sales proceeds 25 \$500,000 that would entitle the fund to \$500,000 of the potential net sales proceeds. 26 Q. Does the spreadsheet identify the capital | 20 | | 20 | A. This suggests to me that there is a capital |
| 23 A. Could you repeat the question. 24 Q. Sure. The potential net sales proceeds 25 the potential net sales proceeds 26 Q. Does the spreadsheet identify the capital | 21 | | 21 | account balance of an amount near to or greater than |
| 24 Q. Sure. The potential net sales proceeds 24 Q. Does the spreadsheet identify the capital | 22 | <u>-</u> | 22 | \$500,000 that would entitle the fund to \$500,000 of |
| 2. Zono die opreniente neutrini in exp. | | | 23 | the potential net sales proceeds. |
| Page 115 | 24 | Q. Sure. The potential net sales proceeds | 24 | Q. Does the spreadsheet identify the capital |
| rage 113 | | Page 115 | | Page 116 |
| 1 account anywhere? 1 reflected on the K-1s that come up from the project | 1 | account anywhere? | 1 | reflected on the K-1s that come up from the project |
| 2 A. It does. 2 partnership. | 2 | | 2 | |
| 3 Q. Where? 3 Q. On the last page of Exhibit 40, it says | 3 | Q. Where? | 3 | Q. On the last page of Exhibit 40, it says |
| 4 A. Right below the potential net sales 4 "06/18/18" under the comment, do you see that? | 4 | A. Right below the potential net sales | 4 | |
| 5 proceeds is the projected tax capital balance of 5 A. Under the comment? | 5 | proceeds is the projected tax capital balance of | 5 | A. Under the comment? |
| 6 1,021,000, 1,021,266. 6 Q. Yes. Do you see where it says there, | 6 | 1,021,000, 1,021,266. | 6 | Q. Yes. Do you see where it says there, |
| 7 Q. Okay. If the potential net sales proceeds 7 "06/18/18"? | 7 | Q. Okay. If the potential net sales proceeds | 7 | "06/18/18"? |
| 8 of \$847,000 are available, that would still produce 8 A. No. | 8 | of \$847,000 are available, that would still produce | 8 | A. No. |
| 9 a shortfall for the positive capital account balance 9 Q. It's not the last page. Sorry. It's | 9 | a shortfall for the positive capital account balance | 9 | Q. It's not the last page. Sorry. It's |
| 10 as reflected in this sheet, right? 10 Page 5196. It says, "Comment: 06/18/18," do you | 10 | as reflected in this sheet, right? | 10 | Page 5196. It says, "Comment: 06/18/18," do you |
| 11 A. As reflected in this sheet, correct. 11 see that? | 11 | A. As reflected in this sheet, correct. | 11 | see that? |
| 12 Q. The difference between those two numbers 12 A. I do. | • | - | 12 | |
| | 12 | | | Q. The comment says, "PRIM." What is PRIM? |
| 14 it? 14 A. PRIM stands for portfolio risk and | | :49 | 14 | • |
| 15 A. The difference between the two numbers? 15 investment management. | 13
14 | | I 15 | investment management |
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15 | A. The difference between the two numbers? | | C |
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16 | A. The difference between the two numbers?Q. Yes. | 16 | Q. What is that? |
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17 | A. The difference between the two numbers?Q. Yes.A. No, it does not. | 16
17 | Q. What is that?A. It's a subcommittee with Boston Financial. |
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18 | A. The difference between the two numbers?Q. Yes.A. No, it does not.Q. Do you have any idea why the \$347,000 | 16
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21 | A. The difference between the two numbers? Q. Yes. A. No, it does not. Q. Do you have any idea why the \$347,000 discount was assumed? A. I do, yes. Q. Is that because of the difference in the | 16
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22 | A. The difference between the two numbers? Q. Yes. A. No, it does not. Q. Do you have any idea why the \$347,000 discount was assumed? A. I do, yes. Q. Is that because of the difference in the capital account as reflected in the K-1 in Epicor? | 16
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22 | Q. What is that? A. It's a subcommittee with Boston Financial. Q. Are you on it? A. I am not on it. Q. So that subcommittee, "PRIM residual value analysis highlighted a TCB variance between Epicor and LTK-1," do you see that? |
| 24 this Prism has a higher balance than what is 24 Q. What is TCB? | 13
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23 | A. The difference between the two numbers? Q. Yes. A. No, it does not. Q. Do you have any idea why the \$347,000 discount was assumed? A. I do, yes. Q. Is that because of the difference in the capital account as reflected in the K-1 in Epicor? A. Well, that's one of the reasons, is that | 16
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23 | Q. What is that? A. It's a subcommittee with Boston Financial. Q. Are you on it? A. I am not on it. Q. So that subcommittee, "PRIM residual value analysis highlighted a TCB variance between Epicor and LTK-1," do you see that? A. I do. |

| 1 | Page 117 | | Page 118 |
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| 1 | A. Tax capital balance. | 1 | A. I do. |
| 2 | Q. And then it says, "BFIM likely to receive | 2 | Q. And so the EOC is end of compliance, right? |
| 3 | amount reflected on K-1 versus Epicor," do you see | 3 | A. That's right. |
| 4 | that? | 4 | Q. The notation you made on June 18, 2018 was |
| 5 | A. I do. | 5 | you were going to make the adjustment necessary |
| 6 | Q. Did you make these notations? | 6 | between the difference between the capital account |
| 7 | A. These are my notations. | 7 | as reflected in the K-1 versus Epicor of \$319,000, |
| 8 | Q. Why did you make the notation that you | 8 | right? |
| 9 | would be likely to receive the amounts reflected on | 9 | A. That's right. |
| 10 | the K-1 versus Epicor? | 10 | Q. And then that would produce a positive |
| 11 | A. The Epicor balance is too high. It's our, | 11 | capital account in what amount? |
| 12 | quote, unquote, outside basis. It's not reflective | 12 | A. It would be closer to what is reflected |
| 13 | of what our K-1 tax capital balance is at the | 13 | here on the K-1 ending capital balance of 646,397. |
| 14 | project level, and as a practice we don't typically | 14 | I'm not doing the math, but |
| 15 | negotiate based on Epicor. | 15 | Q. Understood. So there's the 646,397 K-1 |
| 16 | Q. You negotiate based on the K-1? | 16 | ending capital account that you had at that time, |
| 17 | A. We do. | 17 | correct? |
| 18 | Q. Tax capital balance, TCB, that is the same | 18 | A. That's correct. |
| 19 | thing as a capital account balance, right? | 19 | Q. And you were going to use that as the |
| 20 | A. Yes. | 20 | number at the end of the compliance period that you |
| 21 | Q. And then you go on to make the notation | 21 | would negotiate for, right? That's what you are |
| 22 | "Adjustment of (\$319,180) used to display in Prism | 22 | referring to when you say, "EOC TCB," correct? |
| 23 | the EOC TCB that we expect to negotiate for," do you | 23 | MS. FRIEDMAN: Objection. |
| 24 | see that? | 24 | A. Correct, but that's not the number. |
| | Page 119 | | Page 120 |
| 1 | Q. When you said, "Adjustment of 319,180 used | | |
| | Q. When you said, Adjustinent of 519,160 used | 1 | correct? |
| 2 | to display in Prism the EOC TCB that we expect to | 1 2 | correct? A. Correct. |
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| 2 | to display in Prism the EOC TCB that we expect to | 2 | A. Correct. |
| 2 | to display in Prism the EOC TCB that we expect to negotiate for," what number were you intending to | 2 3 | A. Correct.Q. On Page 5193, there's a calculation that |
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4 | to display in Prism the EOC TCB that we expect to negotiate for," what number were you intending to negotiate for if it's not the 646,397? | 2
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4 | A. Correct.Q. On Page 5193, there's a calculation that provides an assumed sale price at fair market value |
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5 | to display in Prism the EOC TCB that we expect to negotiate for," what number were you intending to negotiate for if it's not the 646,397? A. The 646,397 becomes a starting point for our capital account analysis. One thing that Prism does not or is not able to calculate is the gain | 2
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5 | A. Correct. Q. On Page 5193, there's a calculation that provides an assumed sale price at fair market value for the Fern Hall Apartment Complex, correct? A. Correct. Q. The value as of the date of this |
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8 | to display in Prism the EOC TCB that we expect to negotiate for," what number were you intending to negotiate for if it's not the 646,397? A. The 646,397 becomes a starting point for our capital account analysis. One thing that Prism does not or is not able to calculate is the gain or loss on sale. So if you were to assume a sale | 2
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8 | A. Correct. Q. On Page 5193, there's a calculation that provides an assumed sale price at fair market value for the Fern Hall Apartment Complex, correct? A. Correct. Q. The value as of the date of this calculation, which was May 16, 2019, the fair market |
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9 | A. Correct. Q. On Page 5193, there's a calculation that provides an assumed sale price at fair market value for the Fern Hall Apartment Complex, correct? A. Correct. Q. The value as of the date of this calculation, which was May 16, 2019, the fair market value that you projected was \$1,900,066.13, correct? |
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14 | A. Correct. Q. On Page 5193, there's a calculation that provides an assumed sale price at fair market value for the Fern Hall Apartment Complex, correct? A. Correct. Q. The value as of the date of this calculation, which was May 16, 2019, the fair market value that you projected was \$1,900,066.13, correct? A. That's correct. MS. FRIEDMAN: Objection. Q. And you did that calculation based on a cap rate of 7 1/2 percent, correct? A. Correct. |
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21 | A. Correct. Q. On Page 5193, there's a calculation that provides an assumed sale price at fair market value for the Fern Hall Apartment Complex, correct? A. Correct. Q. The value as of the date of this calculation, which was May 16, 2019, the fair market value that you projected was \$1,900,066.13, correct? A. That's correct. MS. FRIEDMAN: Objection. Q. And you did that calculation based on a cap rate of 7 1/2 percent, correct? A. Correct. Q. You basically did an NOI analysis to come to that fair market value sale price for this calculation, correct? A. Correct. Q. And so you calculated the fair market value calculation for the sale price and then ran it through 10.1B to come to some numbers, correct? |
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22 | to display in Prism the EOC TCB that we expect to negotiate for," what number were you intending to negotiate for if it's not the 646,397? A. The 646,397 becomes a starting point for our capital account analysis. One thing that Prism does not or is not able to calculate is the gain or loss on sale. So if you were to assume a sale and liquidation, there would be a loss or gain event from that sale. Prism is not equipped to be able to make that calculation, and so we make that calculation offline, if you will. Q. And that's a calculation that assumes the sale of the project and liquidation of the partnership, correct? A. Correct. Q. And the projected disposition year was 2020, correct? A. That's correct. Q. And the purchase option year was 2019, correct? A. Correct. | 2
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Page 149 Page 150 1 not applicable. 1 Q. So understanding the capital account 2 2 Q. Right. So to close the loop on that, if disagreement -- and I understand that you contend 3 3 the capital accounts are determined to be not there are other material errors. 4 applicable, there really is no material error that 4 A. Okay. 5 produces a materially different buyout price, correct? 5 Q. But once the capital account is taken out 6 MS. FRIEDMAN: Objection. 6 of the analysis as you prepared this, those other 7 7 A. Could you rephrase the question. alleged material errors have no material impact on 8 8 Q. I don't know if I can. That was so good. the buyout price, do they? 9 A. I know, but I... I still contend that 9 MS. FRIEDMAN: Objection. 10 there are other material errors. So I understand 10 A. Correct. MR. DAVENPORT: Off the record. 11 what you are asking me, but I am afraid my answer is 11 12 going to qualify my objection to the other errors. 12 (Discussion off the record) 13 There are other errors in that appraisal. 13 (Recess at 3:09 p.m.) 14 Q. I understand that contention. When we look 14 BY MR. DAVENPORT: (3:22 p.m.) 15 at your analyses here -- and I understand you 15 Q. You understand that you are still under oath? 16 contend there are other material errors -- we know 16 A. I do. 17 17 the capital account issue. We talked about that ad Q. You are familiar as a result of this 18 18 litigation with certain buyout efforts relating to nauseam, right? 19 MS. FRIEDMAN: Objection. 19 other project partnerships in the BFIM-related 20 A. We could speak more about the capital 20 portfolio of properties, correct? account, to be honest. We've talked about the 21 21 A. Can you be more specific on the properties. 22 waterfall. 22 Q. Sure. You are aware that the general 23 23 MS. FRIEDMAN: Ad nauseam. partner in a property called Laurel Oaks in South 24 A. Ad nauseam. 24 Carolina sought to purchase the limited partners' Page 151 Page 152 interest in that project partnership, aren't you? 1 Fern Hall? 1 2 2 A. Yes. A. Correct. 3 Q. And you are aware that similar efforts were 3 (Document marked as Rogers 4 sought with respect to a property called Magnolia, 4 Exhibit 44 for identification) 5 5 Q. Exhibit 44 is dated August 25, 2017, correct? correct? 6 6 A. Yes. A. Correct. 7 Q. And that similar efforts were sought with 7 Q. Do you know who Douglas Company is? 8 respect to a property called Wellington, correct? 8 A. Yes. 9 9 Q. Who is the Douglas Company? A. Correct. 10 Q. And you know that the general partner in 10 A. They are a development company, a 11 those three project partnerships sought to acquire 11 development company that we have entered into 12 the limited partners' interests, correct? 12 partnerships with. 13 A. Correct. 13 Q. Is it your understanding that this is the 14 Q. And you know that the general partner in 14 buyout notice that Douglas Company delivered at those three deals proposed to use Phil Jones from least to BFIM Special Limited Partner, Inc.? 15 15 16 Cushman & Wakefield, correct? 16 A. (Examines document) This looks to be a 17 A. Correct. 17 component. 18 Q. And you are aware that the buyout notices 18 Q. It just doesn't have the appraisals 19 relating to those three deals incorporated 19 attached to it; is that right? 20 2.0 Mr. Jones' appraisals of value, correct? A. Correct. 21 A. Correct. 21 Q. It's addressed to BFIM Special Limited 22 Partner, Inc., which is one of the named Defendants 2.2 Q. And are you also aware that Mr. Jones' 23 methodology employed in those appraisals was similar 23 in this lawsuit, correct? 24 to the methodology he employed here with respect to 24 A. That's correct.

| 1 | Page 153 | | Page 154 |
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| _ | Q. And it's your that understanding as a | 1 | the Laurel Oaks project partnership sorry the |
| 2 | result of this buyout notice, there were I'll | 2 | Magnolia project partnership? |
| 3 | strike that. | 3 | A. To the best of my knowledge, and, again, |
| 4 | (Document marked as Rogers | 4 | recognizing that it does not have the appraisal |
| 5 | Exhibit 45 for identification) | 5 | component, yes. |
| 6 | Q. I've placed in front of you another buyout | 6 | (Document marked as Rogers |
| 7 | notice from the Douglas Company that was sent to | 7 | Exhibit 46 for identification) |
| 8 | Boston Financial Investment Management, Special | 8 | Q. Exhibit 46 is also from the Douglas |
| 9 | Limited Partner, Inc., do you see that? | 9 | Company. It is addressed to at least the BFIM |
| 10 | A. Yes. | 10 | Special Limited Partner, Inc., correct? |
| 11 | Q. This is a buyout notice in connection with | 11 | A. Yes. |
| 12 | the Magnolia Place Apartments LP, correct? | 12 | Q. You understand this is a buyout notice that |
| 13 | A. Correct. | 13 | Douglas provided to BFIM Special Limited Partner in |
| 14 | Q. And BFIM Special Limited Partner, as you | 14 | connection with its efforts to acquire the limited |
| 15 | understand it, is the special limited partner of | 15 | partner interests in Wellington Senior Apartments? |
| 16 | Magnolia Place, correct? | 16 | A. Correct. |
| 17 | A. As I understand it, correct. | 17 | (Document marked as Rogers |
| 18 | Q. You also understand it's the special | 18 | Exhibit 47 for identification) |
| 19 | limited partner in Laurel Oaks, correct? | 19 | Q. I'm showing you what was marked as |
| 20 | A. Correct. | 20 | Exhibit 47. Do you recognize this as an email |
| 21 | Q. Is it your understanding that this is the | 21 | exchange that you had relating to the Oaks of |
| 22 | buyout notice that Douglas sent to the BFIM Special | 22 | Wellington? |
| 23 | Limited Partner, Inc., in connection with its | 23 | A. Yes. |
| 24 | efforts to acquire the limited partner interests in | 24 | Q. The Oaks of Wellington is the same |
| | Page 155 | | Page 156 |
| 1 | Wellington Senior Apartments that is identified in | 1 | A. Correct. |
| 2 | the buyout notice in Exhibit 46, correct? | | |
| | | 2 | Q. Relative to the Oaks of Wellington project, |
| 3 | A. Correct. | 3 | Q. Relative to the Oaks of Wellington project,
the Boston Financial Investment Management Special |
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| | A. Correct. | 3 | the Boston Financial Investment Management Special |
| 4 | A. Correct.Q. When you were having these communications | 3 4 | the Boston Financial Investment Management Special
Limited Partner approved Phil Jones at Cushman & |
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5 | A. Correct.Q. When you were having these communications with these individuals, you were doing so in your | 3
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| Potential Net Sale Proceed | | | | | |
| Potential Net Sale Proceeds | | n Hall I - 105966 (0: | 732) | | |
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| Sales Price (FMV) Ferminal Debt | \$1,966,013
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| ► Sales Cost | \$76,084 | \$76,084 | | | |
| Potential Net Sale Proceeds | \$847,761 | \$847,761 | | | |
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| Revenue Growth Rates | Current Year: 2.0 | | ear: 2.00% | | |
| Data Element | Calculated Value | Override Value | Adjusted Calculated
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| Projected Disposition Year | 2020 | | | Forward | |
| Final Compliance Year | 2018 | 9 | | | |
| stabilized Year (UW only) | | | | | |
| lap Rate% | 7-50 % | 7.50% | 7.50 % | | |
| Revenue | \$336.973 | 1 | | | |
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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA COMPLEX BUSINESS LITIGATION DIV.

CASE NO.: 2019-16913-CA-01 (44)

OPA-LOCKA COMMUNITY DEVELOPMENT CORPORATION, INC., a Florida non-profit corporation,

Plaintiff,

v.

HK ASWAN, LLC, a Massachusetts limited liability company, HALLKEEN MANAGEMENT, INC., a Massachusetts corporation, and ASWAN VILLAGE ASSOCIATES, LLC, a Florida limited liability company,

| Defend | ants. | | |
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OMNIBUS ORDER ON (i) DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, (ii) PLAINTIFF'S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT, (iii) PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT, AND (iv) DEFENDANT HALLKEEN MANAGEMENT, INC.'S MOTION FOR SUMMARY JUDGMENT ON COUNT I

THIS MATTER came before the Court on (i) Defendants HK Aswan, LLC ("HK Aswan"), HallKeen Management, Inc. ("HallKeen Management"), and Aswan Village Associates, LLC's ("Owner" or "AVA") (collectively, "Defendants") Motion for Summary Judgment ("Defs. Mot.") against Plaintiff Opa-Locka Community Development Corporation ("OLCDC" or "Plaintiff"); (ii) OLCDC's Renewed Motion for Partial Summary Judgment ("OLCDC Renewed Mot."); (iii) OLCDC's Motion for Judgment on the Pleadings or, in the Alternative, Partial Summary Judgment ("OLCDC MJP"), and (iv) Defendant HallKeen Management's Motion for Summary Judgment on Count I ("HKM Mot.") against OLCDC. Based upon the Court's review of the motions, the supporting exhibits, deposition and other

transcripts, the applicable portions of the record, argument of counsel, and being otherwise duly advised in the premises, the Court makes the following findings:

Findings of fact

This matter concerns an affordable housing apartment complex located in Opa-locka, Florida, which is known as Aswan Village Apartments ("Aswan Village"), and a right of first refusal granted thereon to OLCDC. OLCDC is a South Florida-based 501(c)(3) nonprofit corporation whose mission is to transform under-resourced Florida communities into desirable, engaged neighborhoods by improving access to, among other things, affordable housing. In 2000, OLCDC joined Banc of America Community Development Corporation ("BACDC") in forming the Company for the purpose of acquiring, developing, and operating Aswan Village as affordable housing, and to finance those activities through participation in the Low Income Housing Tax Credit ("LIHTC") program, 26 U.S.C. § 42 et seq. ("Section 42").

In 2003, after Aswan Village qualified for the allocation of tax credits, OLCDC and BACDC restructured the Company to admit Banc of America Housing Fund ("BOA"), as tax credit investor, and Aswan Development Associates, LLC ("ADA"), as the Class A Member. Contemporaneously, OLCDC and BACDC withdrew from the Company and were admitted to ADA, leaving BOA and ADA as the only members of the Company. The Company also entered into a First Amended and Restated Operating Agreement, which includes several amendments (the "Amended Operating Agreement"). In accordance with OLCDC's mission and Section 42's aims, BOA and ADA expressly agreed in the Amended Operating Agreement that the Company and Aswan Village would be operated in compliance with Section 42 to "[p]rovide quality affordable housing and combat further community deterioration."

Consistent with that mission, in connection with this Amended Operating Agreement, OLCDC bargained for, and the Company agreed to, a Right of First Refusal Agreement under Section 42 (the "**ROFR**"). It provides, in relevant part:

Right of First Refusal. After the end of the Compliance Period, the Company will not sell the Project or any portion thereof to any Person without first offering the Project for a period of forty-five (45) days to Purchaser (if it then qualifies as an organization described in Section 42(h)(5)(c) of the Code) (the "Buyout"), at a price (the "Buyout Price") [set forth in Section 42(i)(7) of the Code]; provided, however, that such right of first refusal shall be conditioned upon an agreement by Purchaser to maintain the Project for low-income use for at least fifteen (15) years after the later of the end of the Compliance Period (but in no event can such low-income use terminate before the end of the Extended Use Period) under Section 42 of the Code In the event that Purchaser does not purchase the Company Property on the terms set forth above, then the right of first refusal granted herein shall lapse. ***

HKM is a Massachusetts-based, for-profit corporation that operates collectively as an owner and investor and manager of affordable housing. In 2014, after the Credit Period was over and BOA had received all of its bargained-for tax credits, BOA sold its tax credit investor position. Specifically, HKM, through its specially created affiliate, HKA, acquired all of BACDC's ownership interests in ADA for between \$250,000 - \$400,000. As a result, HKA became ADA's 51% owner and the Company's Manager. HKA then caused ADA to redeem all of BOA's interests in the Company, leaving ADA as the sole member of the Company and HKA as the controlling member of ADA and the Company. OLCDC retained its 49% position in ADA.

HKM then caused HKA to engage HKM to act as the Company's Management Agent. As such, HKM manages Aswan Village's day-to-day operations and is compensated for those services accordingly. As the Company's Management Agent, HKM is empowered with the managerial powers delegated to it by HKA. When HKM caused HKA to purchase BACDC's interests in 2014, it sought to eliminate the ROFR, but OLCDC refused. Thus, when ADA's

operating agreement was amended (the "<u>ADA Agreement</u>") to allow HKA's admission into ADA, the parties expressly maintained OLCDC's ROFR as a "distinct right" in their agreements. As a compromise, the parties agreed to add Section 10 to the ADA Agreement, which the parties refer to as the "forced sale provision." It provides, in relevant part:

From and after the end of the Compliance Period . . . , OLCDC shall have the right to direct [HKA] to cause [the Company] to put [Aswan Village] on the market for sale [The Company] will, in accordance with Section 14.02 (Right of First Refusal) of the [Amended] Operating Agreement first offer the Project for sale to OLCDC. If, after having directed [HKA] to cause [the Company] to put the Project on the market for sale, OLCDC elects to exercise its right of first refusal, then OLCDC agrees that . . . OLCDC shall purchase all of the Interests owned by HKA in ADA

Absent the invocation of this Section 10 right under the contractually agreed-upon circumstances, Defendants recognize that, because of the ROFR, they have "no real equity" in the Company and Aswan Village and have "no value except through operating cash flow." Accordingly, when Defendants consummated the aforementioned transaction to acquire BOA's position in the Company, they paid no more than \$400,000 because OLCDC's ROFR preserved all of Aswan Village's equity for OLCDC, which is precisely its intent of the ROFR and consistent with the policy goals and objectives of Section 42 and LIHTC program in general. It is undisputed true that Owner has not entered into a purchase and sale agreement for the sale of the Property at any time, nor scheduled a closing to consummate a sale of the Property.

It is important for this Court to detail how the Low Income Housing Tax Credit ("LIHTC") Program works. As set forth in Section 42, the LIHTC program is a federal subsidy program specifically designed to promote the nationwide development and preservation of rental housing that is affordable to low and moderate income households. The LIHTC program subsidizes low-income housing by: (1) making available to a "qualified low-income housing project" tax credits, which provide a dollar-for-dollar income tax reduction; and (2) permitting

institutional investors with large, annual, and predicable income tax obligations (known as "tax credit investors"), such as banks, to acquire these tax credits in exchange for providing capital necessary to develop the project. Low Income Housing Tax Credit: The Role of Syndicators, U.S. Government Accountability Office, GAO 17 285R, at 1, 4 (February 16, 2017), https://www.gao.gov/assets/690/ 682890.pdf (hereinafter, "The Role of Syndicators"). In the typical case, this is accomplished by the tax credit investor's equity investment into a partnership or similar "pass-through" tax entity—in this case, a limited liability company—created for the purpose of developing the apartment complex. The Role of Syndicators, at 1; The Low-Income Housing Tax Credit Program at Year 25: An Expanded Look at Its Performance, Cohn Reznick LLP at 67 (December 2012), available at https://www.cohnreznick.com/insights/lihtc-programyear-25-expanded-look-at-performance. In return for the infusion of capital—which is combined with debt necessary to finance the development—the tax credit investor, which consequently holds almost all of the equity in the entity (usually 99 percent or more), is allocated a commensurate amount of the tax benefits flowing from operations of the apartment complex, including the LIHTC tax credits and other tax losses and deductions. Through this framework, Section 42 advances the deliberate policy choice to replace a typical equity investor's expectations of "economic cash flow or appreciation" from the apartment complex with a comparable or better return on investment "almost solely derived from tax benefits."

To ensure low-income housing is not immediately converted to market-rate housing, the LIHTC program staggers the allocation of the tax credits over a period of ten years, known as the Credit Period. Further, to avoid recapture of the tax credits after they have been allocated, the owner of an affordable housing must continue to comply with rent affordability restrictions for a contemporaneously running period of fifteen years, known as the Compliance Period. Moreover,

for any LIHTC project allocated tax credits after 1989—as is the case here—the owner of the project must also agree to comply with the affordability restrictions for an additional fifteen years after the Compliance Period, known as the Extended Use Period, meaning affordability restrictions remain in place for a total of thirty years following the apartment complex being placed into service.

But the LIHTC program's aim of creating and preserving low-income housing does not end at thirty years. Rather, the LIHTC program seeks to preserve low-income housing in perpetuity by creating a special role for nonprofits, like OLCDC, whose missions are not to profit from a sale of the low-income housing project, but to continue to develop and preserve the low-income housing in perpetuity for the betterment of the public and the community in which project is located. Specifically, the LIHTC program, which is administered locally by the Florida Housing Finance Corporation, requires each State to set aside at least ten percent of its allocable tax credits—the obtainment of which is highly competitive—for projects developed and operated in conjunction with a qualified nonprofit organization, such as OLCDC.

In addition, and as particularly relevant here, Section 42 expressly authorizes the owners of the apartment complex to grant a "qualifying nonprofit organization" a "right of first refusal" to facilitate the inexpensive transfer of the project "after the close of the compliance period" for a statutorily-defined, below-market "minimum purchase price." 26 U.S.C. § 42(i)(7)(A). In doing so, Section 42(i)(7) creates "a safe harbor for property owners," without which longstanding tax law would operate to "disqualify[] them from the tax credits that are the key economic incentive for their investment in affordable housing." The expectation is for the properties to remain with the nonprofit owners in perpetuity and to continue to be operated as affordable housing.

In October 2018, in response to an article regarding Miami's drinking water, HKM and HKA unilaterally commenced discussions regarding the sale of Aswan Village, engaged brokers to obtain broker opinions of value for Aswan Village, concluded that Aswan Village had substantial equity, and conducted potential disposition analyses regarding Aswan Village. (Documenting Defendants' impression that they should "sell [their] Miami area properties ASAP" and that, accordingly, they "should find out quickly" what they "could sell them for"). There is no dispute that Defendants were aware of the existence of OLCDC's "distinct" ROFR at all relevant times. There is also no dispute that Defendants engaged in a sequence of events to execute their "Florida recapitalization plan." This "recapitalization plan" included the ultimate fee simple sale of, or transfer of ownership interests in, Aswan Village and two other Florida LIHTC properties—Park City Apartments ("Park City") and Palmetto Park Apartments ("Palmetto")—to a new ownership entity.

Before Defendants approached OLCDC regarding the possible sale of Aswan Village, Park City and Palmetto, and before they informed OLCDC of their unilateral intentions and actions, Defendants had already begun soliciting proposals from third parties to acquire the three properties, including a third party known as Lincoln Avenue Capital ("LAC" or "Lincoln"). In fact, on April 15, 2019, LAC, a trade name for an affordable housing developer that conducts business through various entities, presented a letter of intent proposing two joint venture transactions regarding the "Aswan Village Apartments" to Mark Hess, Vice President of Acquisition and Development of HallKeen Management. ("LOI"). Mr. Hess had been communicating with Lincoln's representatives regarding Lincoln's interest in the Property for the purpose of presenting Lincoln's proposal to HK Aswan and OLCDC so they, as members of

ADA, could consider the joint venture transactions proposed. The LOI expressly acknowledges its preliminary, nonbinding nature. In material part, the LOI states on the first page:

[T]his Letter of Intent, outlining certain terms under which Lincoln Avenue Capital (the 'Buyer') intends to negotiate a mutually acceptable Purchase and Sale Agreement ('PSA') for the purchase of the above captioned real estate This letter shall not create any binding obligations on any party hereto, and completion of the transaction remains subject to the successful negotiation and execution of a PSA between the parties.

Id.

The LOI proposed two alternative joint venture structures. The first structure, which contemplated "closing directly into the tax credit partnership," listed a sales price of \$21,000,000. *Id.* The second structure, which contemplated "closing into bridge partnership prior to tax credit partnership," listed a price of \$20,370,000. *Id.*

On March 6, 2019, Mark Hess updated the HKM "Investment Committee" regarding the "proposals" "we recently solicited . . . to dilute our equity interests in the 3 Florida deals." In providing this update, Mr. Hess remarked: "Please see the DRAFT Roseview outline pitched below. One nice thing about this structure is that it may appear relatively innocuous to OLCDC" (*Id.*) Additionally, as reflected in a March 13, 2019 e-mail, LAC wrote to Defendants: "Per our conversation yesterday, enclosed in this email is a LOI from Lincoln Avenue Capital for the "HallKeen Florida assets (Park City Apartments, Aswan Village Apartments, and Palmetto Park Apartments)."

At this time, Defendants did <u>not</u> understand OLCDC to have decided to buyout HKA's interests under Section 10 of the ADA Operating Agreement commenting internally on March 14, 2019: "If we pick our timing and go to OLCDC with 10/10 on with 20% we may be able to sell this [LAC] Aswan deal to Willie." This reflected Defendants' understanding on March 4, 2019 that "[Aswan Village] is still the trickiest because we need to meet OLCDC objectives and

they, so far, are resisting a sale or fixing up any portion of their interest." The undisputed evidence of record establishes that, on March 18, 2019, OLCDC did not request or otherwise cause Defendants to solicit any proposals. Indeed, the undisputed evidence of record is that Defendants had been working to not only solicit proposals to sell Aswan Village prior to this time, but they were concurrently soliciting proposals to sell Park City and Palmetto as well. There is no dispute that Defendants "disclose[d] having 5 proposals" to sell all three LIHTC properties, which included Aswan Village, and declared that they would "make a final decision on April 3 and then inform [OLCDC] of what the deal is."

It is undisputed that, on April 4, 2019, Defendants requested that the combined LOI for all three properties—that Defendants had solicited on March 12 and received on March 13—"be structured as 3 standalone offers," acknowledging that there were "different parties with different interests invested in each deal." Defendants further requested that LAC confirm that it did "not need the offers to be interdependent." On April 8, 2019, after a self-described "productive call" with LAC, Mark Hess informed the "Investment Committee" that it could "Expect 3 standalone LOIs this week" and also noted that LAC had "increased" the "Park City offer by \$850k to \$14.35 million."

On April 9, 2019, before Defendants had received the updated LOIs from LAC, Mr. Hess instructed another individual to begin assembling various environmental due diligence documents "[i]n preparation for accepting LOI's on the Florida portfolio." On April 16, 2019, Defendants sent to OLCDC for "partner approval" an LOI from LAC that Defendants had executed, "acknowledged and accepted" on behalf of the Company, as the proclaimed "SELLER" of Aswan Village. In the e-mail forwarding the LOI, Defendants declared: "As you can see from the attached LOI, we have decided to go forward with Lincoln Avenue Capital . . .

the pricing came in a bit better than we expected with . . . \$21,000,000 for Aswan." (*Id.*) Defendants then described what "will" happen as a result of the sale to LAC.

More specifically, Defendant "outlined the general structure of the transaction should [OLCDC] desire to proceed . . . as stated in the LOI." Defendant also informed Logan that any further discussions with Lincoln were conditioned upon OLCDC agreeing to terminate, or waive, its right of first refusal. Defendants also stated it was "anxious to keep the process moving with LAC," and consequently wanted OLCDC's own "decision" as to whether it would consent to the sale or buyout HKA. There is no dispute that, before sending the LOI to OLCDC on April 16, 2019, Defendants first returned an executed, "acknowledged and accepted" copy of the LOI to LAC.

Additionally, on April 16, 2019, Defendants updated one of the brokers, informing him that Defendants "are looking for partner consent right now to move forward with a J/V ownership/syndication on all 3 deals" On April 22, 2019, Defendants contacted one of the unsuccessful prospective purchasers from whom Defendants had solicited a proposal. Defendant stated Defendants "executed an LOI with a J/V partner on the 3 properties last week" and "hope[d] to get to a [purchase and sale agreement] over the coming weeks." (Exhibit B to Renewed Motion) Defendants then thanked the prospective purchaser for its interest in the deals and indicated Defendants' "interest[] in finding a way to work with" the prospective purchaser "in the future." (*Id.*) That same day, Defendants informed LAC that due diligence documents would be "posted tomorrow."

On April 29, 2019, Defendants provided LAC with a draft purchase and sale agreement ("**PSA**") for Palmetto. Defendants then stated: "Once we have a sense of your comments on the Palmetto PSA, we can use this as a base form to quickly finalize [the Project] and Park. In the

meanwhile, we will start on the PSA exhibits." That same day, Defendants executed and returned engagement letters to Novogradac & Company LLP ("Novogradac") for the preparation of "sales projections" analyses "for Park and [Aswan Village]," which Defendants requested Novogradac "then forward . . . to our team so that we can help prepare the waterfall for the tiers."

On May 5, 2019, in response to a request for an update regarding apartment staff messaging, Defendants expressed: "Hopefully we will have Palmetto's signed PSA by Friday and the balance over the following week or two." The next day, May 6, 2019, OLCDC conveyed to Defendants the requisite "partner approval" to the LOI, subject to the exercise of OLCDC's ROFR, thus providing full ADA member approval to the sale. OLCDC made it clear that it did not intend to terminate or waive its right of first refusal. On May 7, 2019, after OLCDC provided the requested "partner approval" to the LOI, Defendants told LAC that they "were unable to secure our partner approvals" and "had to let the LOI lapse." Defendants argue that because OLCDC did not agree to terminate its preemptive right, Defendants informed Lincoln that "partner approval" had not been obtained to proceed with the LOI. Defendants take the position that HK Aswan and OLCDC, as the two members of ADA, failed to reach an agreement on how to proceed regarding the joint venture transactions proposed in the LOI.

Defendants refused to permit OLCDC to exercise its ROFR and/or close on the sale of Aswan Village pursuant to resulting option contract that arose when OLCDC exercised its ROFR. On June 5, 2019, OLCDC filed this Complaint. OLCDC alleges the Defendant's actions triggered its right to exercise its ROFR. OLCDC asks this Court to compel Owner to transfer title to the Property pursuant to and in accordance with the Agreement. Defendants argue that because no sale was ever scheduled to occur (nor did a sale in fact occur), Defendant was not

obligated to offer the Property to OLCDC for purchase because the ROFR was not triggered and

remains unripe.

Legal Standard in Addressing a Motion for Summary Judgment

In accordance with Rule 1.510(c), Florida Rules of Civil Procedure, summary judgment

will be ordered if the pleadings, depositions, affidavits, answers to interrogatories, and

admissions filed together with the affidavits, if any, show there is no genuine issue as to any

material fact and that the moving party is entitled to judgment as a matter of law. Fla. R. Civ.

P. 1.510(c). Volusia County v. Aberdeen at Ormond Beach, 760 So. 2d 126, 130 (Fla. 2000). In

simple terms, summary judgment is granted when there remains no issue of material fact to

litigate. ARC Foods, Inc. v. NGI Props., 724 So. 2d 663 (Fla. 2d DCA 1999). While the moving

party has the initial burden of demonstrating the nonexistence of any genuine issue of material

fact, the non-moving party must then counter with evidence sufficient to reveal a genuine issue.

Publix Supermarkets, Inc. v. Austin, et al., 658 So. 2d 1064, 1068 (Fla. 5th DCA 1995); Golden

Hills Golf & Turf Club, Inc. v. Spitzer, et al., 475 So. 2d 254 (Fla. 5th DCA 1985).

Conclusions of law

Defendants contend that under Florida law there are two threshold conditions that must

be met to trigger a right of first refusal: (i) the existence of a third-party offer to purchase the

property at issue, and (ii) an owner's expressed willingness to accept such offer. Because the

LOI is nonbinding by its own language, Defendants assert it cannot constitute an "offer" capable

of "acceptance" and, therefore, cannot trigger OLCDC's right of first refusal. OLCDC,

conversely, argues there is no requirement under Florida law of the existence of a third-party

offer and that OLCDC's right is triggered at the moment Defendants manifested an intention to

sell Aswan Village.

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The parties do not dispute that the language of the Agreement is plain and unambiguous. The interpretation of an unambiguous contract involves a pure question of law. *Press v. Jordan*, 670 So. 2d 1016, 1017 (Fla. 3d DCA 1996); *Jaar v. Univ. of Miami*, 474 So. 2d 239, 242 (Fla. 3d CA 1985). Florida law clearly recognizes that "[a] right of first refusal is a contractual right." *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, 986 So. 2d 1279, 1287 (Fla. 2008) ("*Old Port Cove*"). Therefore, like any contractual right, a court determines whether a right of first refusal was triggered by interpreting and enforcing the specific language of the parties' agreement creating the right. *See Robbinson v. Cent. Props., Inc.*, 468 So. 2d 986, 988 (Fla. 1985) (recognizing that, in interpreting a right of first refusal agreement, "the intention

The ROFR, at issue in this case, in relevant part, states:

Right of First Refusal. After the end of the Compliance Period, the Company [Owner] will not sell the Project or any portion thereof to any Person without first offering the Project for a period of forty-five (45) days to Purchaser . . . at a price (the "Buyout Price") . . .

of the parties governs, and such intention will be determined from the language used when it is

OLCDC's interpretation of this language is that, in accordance with Section 42, its right to receive the "first offer[]" to purchase Aswan Village is triggered at the moment Defendants manifested an intention to sell Aswan Village. Defendant's interpretation of the ROFR is that it is triggered only after Defendant has entered into a binding contract with a third-party for the sale of Aswan Village "without first offering" it to OLCDC for purchase, at least, 45 days before any sale is to occur. Defendants argue because no sale was ever scheduled to occur (nor did a sale in fact occur), Owner was not obligated to offer the Property to OLCDC for purchase because the ROFR was not triggered.

unambiguous").

Defendants contend that the ROFR must be interpreted strictly under Florida common law. Under Florida common law, Defendants argue, OLCDC's ROFR is only triggered if the Company had entered into a binding contract for sale and then failed to comply with the ROFR's 45-day notice provision. At minimum, Defendants further argue, Florida common law requires the receipt of an "enforceable offer" in order to trigger OLCDC's ROFR. Contrary to the position advanced by Defendants, it is the finding of the Court that under Florida law, "all the laws which subsist, at the time and place of the making of a contract . . . enter into and become a part of the contract made, as if they were expressly referred to and incorporated in its terms " Humphreys v. State, 145 So. 858, 861 (Fla. 1933). Florida courts accordingly hold that the meaning of contractual terms and attendant rights are animated and defined by applicable law integrated into the contract. See, e.g., Gen. Dev. Corp. v. Catlin, 139 So. 2d 901, 904 (Fla. 3d DCA 1962); see also Coast Cities Coaches, Inc. v. Whyte, 102 So. 2d 848, 852 (Fla. 3d DCA 1958) (stating that courts interpret contracts in accordance with the parties' intentions, considering "not only the words used in the contract but the obvious purpose intended to be accomplished by it").

Given the explicit references to Section 42 throughout the ROFR and the Amended Operating Agreement, there can be no dispute that Section 42 is directly incorporated into and is just as much a part of the plain language of those contracts as the other express words appearing therein. In addition to the text of the ROFR explicitly referencing Section 42, the ripening of OLCDC's "right of first refusal" is tied to the end of the Section 42 "Compliance Period"; the contractual "Buyout Price" is defined, not in accordance with price first offered by a third party, but in accordance with 26 U.S.C. § 42(i)(7); and the exercise of "such right of first refusal" is conditioned only upon OLCDC's agreement to continue to use the Project as affordable housing

for no less than the Extended Use Period as defined by Section 42. (Compl. ¶ 31-35 & Ex. A § 14.02, Ex. E § 1) Because the ROFR and the Agreement expressly refer to and incorporate Section 42, they must be interpreted accordingly. *See, e.g., Humphreys*, 145 So. at 861; *Catlin*, 139 So. 2d at 904.

Defendants would have this Court not only read the ROFR isolated from the remainder of the parties' Amended Operating Agreement, which Defendants do not dispute is fashioned entirely around Section 42, but would have this Court ignore the replete references to Section 42 weaved into the ROFR itself. This Court finds this position unpersuasive.

The Court does not ignore and fully understands the common everyday definition of the word "sell" which means to "give or hand over (something) in exchange for money," *Sell*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010), or "to transfer (property) by sale," *Sell*, BLACK'S LAW DICTIONARY (11th ed. 2019). The Defendant argues that the Court is not at liberty to rewrite the Parties' Agreement. *E.g.*, *19650 NE 18th Ave. LLC v. Presidential Estates Homeowners Ass'n, Inc.*, 103 So. 3d 191, 194 (Fla. 3d DCA 2012) (the court cannot rewrite a contract "to add language the parties did not contemplate at the time of execution."); *Fernandez v. Homestar at Miller Cove, Inc.*, 935 So. 2d 547, 551 (Fla. 3d DCA 2006) ("[A] court is powerless to rewrite [a] contract to make it more reasonable or advantageous to one of the parties."). This Court accepts that it is unable to rewrite a contract to add language the parties did not contemplate at the time of execution. However, that is not what is occurring in this case.

The explicit references to Section 42 throughout the ROFR and the Amended Operating Agreement, commands that Section 42 is directly incorporated into and is just as much a part of the plain language of those contracts as the other express words appearing therein. In addition to the text of the ROFR explicitly referencing Section 42, the ripening of OLCDC's "right of first

refusal" is tied to the end of the Section 42 "Compliance Period"; the contractual "Buyout Price" is defined, not in accordance with price first offered by a third party, but in accordance with 26 U.S.C. § 42(i)(7); and the exercise of "such right of first refusal" is conditioned only upon OLCDC's agreement to continue to use the Project as affordable housing for no less than the Extended Use Period as defined by Section 42. (Compl. ¶ 31-35 & Ex. A § 14.02, Ex. E § 1). Therefore, it is the finding of this Court that the proper "context" in which to interpret a right of first refusal granted in accordance with Section 42 is, "as reflected in the language of the agreements," Section 42. *See Homeowner's Rehab*, 99 N.E.3d at 753, 755.

There is no genuine issue of fact regarding Defendants' intent to sell. First and foremost, Defendants executed the LOI—a document the chief purpose of which is to manifest the signatory's intent. *Midtown Realty, Inc. v. Hussain*, 712 So. 2d 1249, 1252 (Fla. 3d DCA 1998) (stating that a letter of intent memorializes the "preliminary understanding of the parties who intend to enter into contract"). Moreover, no other logical conclusion can be reached from Defendants' undisputed actions, such as, *inter alia*: following the execution of the LOI, which Defendants furnished to LAC before seeking partner approval from OLCDC, declaring to OLCDC that they had "decided to go forward" with the sale to LAC on those terms; thereafter requesting "partner approval," believing that such approval was all that was required "to move forward" with the sale and get to an executed PSA with LAC in mere "weeks"; before hearing from OLCDC, spending significant time and money proceeding with due diligence and the preparation of a PSA and sales disposition analysis in order to "quickly finalize" the sale of the Project for "a \$21 million sale price"; and, after OLCDC exercised its ROFR, telling LAC they hoped to "reconstitut[e] the agreement." Defendants' manifest intent, willingness, and decision

to sell Aswan Village, as a matter of law, triggered OLCDC's right of first refusal to purchase at the Section 42 price.

Defendants' argument is that Andy Burnes—the manager of every asset HKM owns, including HKA, —expressly conditioned Defendants' decision to sell on OLCDC waiving its ROFR rights, and "[a]bsent OLCDC's consent to waiving its ROFR, no desire to sell existed" is unpersuasive and contradicted by the undisputed material facts. Specifically, consistent with Defendants' pleadings, both Defendants' and OLCDC's understanding is that it was the future closing of the contemplated transaction with LAC that "will" cause the ROFR to "go away." (Dep. Ex. 123; Burnes Dep. at 184:17-185:10; 186:3-8); Doc. No. 159 at pp. 10-11 n.12). And, decisively, rather than send an unexecuted LOI to OLCDC and expressly state that its decision to move forward was "conditioned upon" or "subject to" OLCDC's waiver of its ROFR rights, Defendants executed the LOI before they sent it to OLCDC for approval, and also sent an executed copy to LAC. Defendants undisputedly did not add a condition upon the decision they had already made. Therefore, Defendants' arguments fail, and this Court finds that OLCDC's consent provided full authto the LOI sufficient to trigger its ROFR.

Additionally, there is no genuine issue of fact regarding OLCDC's exercise of its ROFR."[O]nce [the Company] manifest[ed] a willingness to [sell]," OLCDC's right of first refusal was triggered, which, once exercised, created an option contract. *McDonald's Corp. v. Roga Enterprises*, Inc., No. 10-21706-CIV, 2010 WL 4384214, at *2 (S.D. Fla. Oct. 28, 2010) (quoting *Old Port Cove*, 986 So. 2d at 1285). "When there is an exercise of the option, a mutually binding and enforceable contract to purchase is created." *Id.* (quoting *Power v. Power*, 864 So. 2d 523, 524-25 (Fla. 5th DCA 2004). It is undisputed that OLCDC exercised its right of first refusal under the ROFR, thus creating an option contract that the OLCDC is entitled to

specifically enforce. Further, it is undisputed that, after OLCDC exercised the ROFR, Defendants have since refused to permit OLCDC to close on the sale of Aswan Village. Thus, the undisputed facts establish that OLCDC's right of first refusal ripened into an option contract, which OLCDC exercised, and which Defendants have consequently breached by refusing to perform thereunder. OLCDC is thus entitled to a summary judgment of specific performance.

Defendants argue that, even if this Court interprets the ROFR in light of Section 42, Section 42 does not support the manifest-intent-to-sell trigger for which OLCDC advocates. This Section 42 does not merely acknowledge that rights of first refusal can be Court disagrees. agreed to by parties in connection with the development of a LIHTC developments, as Defendants suggest. Rather, Section 42 alone makes possible these below-market, "minimum purchase price" rights of first refusal (Section 42 ROFRs) because, in the absence of Section 42's "safe harbor," such below-market rights of first refusal would place the tax credit investors tax credits at risk of recapture. Homeowner's Rehab, 99 N.E.3d at 755-56; Riseboro Cmty. P'ship Inc. v. SunAmerica Hous. Fund No. 682, 401 F. Supp. 3d 367, 375 (E.D.N.Y. 2019) (noting that Section 42(i)(7) expressly allow[s] [qualified nonprofit] organizations to have a ROFR to purchase projects at below market prices"). Put simply, these below-market, "minimum purchase price" rights of first refusal only exists because Section 42(i)(7) exists. Accordingly, as the Homeowner's Rehab court recognized, and this Court agrees, Defendants' argument "fails to acknowledge" that a Section 42 ROFR, such as the ROFR here, "is not purely a creation of the common law" but is granted pursuant to Section 42 and must therefore be interpreted in light of Section 42. Therefore, this Court concludes that, absent language expressly agreed to by the parties to the contrary, all that Section 42 requires as a trigger is a manifest decision to sell by the owner.

Turning to the ROFR here, like Section 42, there is no "binding contract," "enforceable offer" or other express triggering requirements found anywhere upon the face of the document. Rather, the ROFR simply affords OLCDC a "right of first refusal," prohibiting the Company from selling Aswan Village "without first offering" it to OLCDC for a period of 45 days at the Section 42 minimum purchase price. Therefore, interpreting the ROFR here in light of Section 42, as the plain language of the ROFR demands, and in the absence of any express, contractually agreed-to triggering requirements, this Court concludes that the ROFR is triggered, in accordance with Section 42, upon a manifestation of the Company's decision to sell.

Defendants, however, point to the *Homeowner's Rehab* court's affirmance of an "enforceable offer" requirement under the Section 42 ROFR there to argue that an "enforceable offer" requirement should be imposed on the ROFR here. Defendants' argument is misplaced. The ROFR *Homeowner's Rehab*, unlike OLCDC's ROFR, expressly required a third-party offer, the "terms of the proposed disposition" to the third party, and "whether the partner was willing to accept that offer." *Id.* at 750, 761-62. Consequently, finding no inconsistency between Section 42 and Congress's "decision to sell" requirement and the offer requirement expressly agreed to by the parties in their contract, the *Homeowner's Rehab* court upheld the parties' agreed-to offer requirement. The facts of this case command no similar finding.

Additionally, Defendants' reliance upon *Senior Hous. Assistance Group v. AMTAX Holdings 260, LLC* (hereinafter, *SHAG*), C17-1115 RSM, 2019 WL 1417299 (W.D. Wash. Mar. 29, 2019), which held that a bona fide, enforceable offer was required to trigger a Section 42 ROFR, is equally misplaced. The *SHAG* court's decision was rooted solely in what it deemed to be applicable Washington common law, not Section 42 or, at the very minimum, Florida common law. *Id.* at *9-10.

In sum, the Court agrees with OLCDC that the ROFR must be read and interpreted in light of Section 42. Conducting such analysis under the particular contractual language at issue here, the Court concludes that the plain and unambiguous language, which lacks any other triggering mechanisms requires only a manifest decision to sell to trigger OLCDC's ROFR rights.

Significantly, even if this Court were to read and interpret the ROFR in accordance with Florida common law, or any common law for that matter, the Court would reach the same result. In fact, well-settled common law, including Florida common law, is squarely in accord. As particularly relevant here, in Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc., the Florida Supreme Court expressly concurred that, absent other express requirements, "a right of first refusal . . . "ripen[s] into an option depending on whether the owner decides to sell." 986 So. 2d 1279, 1285-87 (Fla. 2008). Florida common law similarly recognizes that, unless the specific language of the right of first refusal at issue requires it, there is "no requirements of a binding contract" to trigger a right of first refusal. See, e.g., Vietor v. Sill, 243 So. 2d 198, 199 (Fla. 4th DCA 1971); accord McDonald's Corp., 2010 WL 4384214, at *2 (reciting Vietor and holding that the owner's execution and transmittal of a non-binding letter of intent to the plaintiff would, if proven, "constitute a willingness to sell the [property] which triggered [its] right of first refusal," despite the defendant's contention that a non-binding letter of intent did not constitute an enforceable "offer") (emphasis added); Vorpe v. Key Island, Inc., 374 So. 2d 1035, 1036 (Fla. 2d DCA 1979) (citing Vietor and concluding that a covenant providing "a right of first refusal for 30 days should [owner] have an opportunity to sell the real property" required a "manifested [] intention to sell" in order for the "right of first refusal" to be "activated").

Defendants nevertheless rely on *Old Port Cove* and other Florida cases such as *Central Properties, Inc. v. Robbinson*, 450 So. 2d 277 (Fla. 1st DCA 1984) to argue that this Court should impose a third-party "offer" requirement onto the ROFR here. However, the courts in those cases were discussing a very different type of right of first refusal. At issue in *Old Port Cove*, for example, was a right of first refusal that, by its express terms, only permitted the defendants to purchase the plaintiff's property "upon the same terms and conditions as are proposed for its sale" to a third party (a "meet-and-match ROFR"). 986 So. 2d at 1281. In light of the meet-and-match nature of that right, the Florida Supreme Court adopted the following widely accepted definition of such a meet-and-match ROFR:

A right of first refusal is a right to elect to take specified property <u>at the same</u> <u>price and on the same terms and conditions as those contained in a good faith</u> <u>offer</u> by a third person if the owner manifests a willingness to accept <u>the offer</u>.

Id. at 1285 (quoting *Pearson v. Fulton*, 497 So. 2d 898, 900 (Fla. 2d DCA 1986)) (emphasis added). Such a meet-and-match ROFR, the Florida Supreme Court continued, therefore "ripens into an option once an owner manifests a willingness to accept a good faith offer." *Id*

Defendants rely upon this language to argue that the receipt of an "enforceable offer" is thus a triggering requirement imposed on all rights of first refusal under Florida common law. But in so arguing Defendants erroneously overlook the Florida Supreme Court's subsequent clarification in *Old Port Cove* that rights of first refusal "vary in form: some require offering the property at a fixed price (or some price below market value), while others . . . simply allow the holder to purchase the property on the same terms as a third party." *Id.* at 1285 (emphasis added). In other words, Defendants' argument entirely disregards *Old Port Cove's* own admonition that meet-and-match ROFRs, which by their express terms require a purchase "on the same terms as a third party" offer, are not the same as rights of first refusal that, as here,

proscribe the owner's ability to sell the property "without first offering" the property at a "fixed price" (a "fixed-price ROFR"). Defendants' legal theory is thus flawed.

Moreover, transposing this meet-and-match, third-party "offer" requirement onto a fixed-price ROFR, like OLCDC's ROFR, would be nonsensical. Specifically, unlike a fixed-price ROFR, which supplies its own terms of sale, a meet-and-match ROFR necessarily requires the receipt of a third-party offer in order to supply the terms on which the holder of the right is entitled to purchase the property. *Steinberg v. Sachs*, 837 So. 2d 503, 505-06 (Fla. 3d DCA 2003. Put another way, "without knowing the terms of the sale [offered by the third party], the [rightholder] could not meet the offer of [the third party] and thus could not properly exercise their right of first refusal." *E.g.*, *Tribble v. Reely*, 557 P.2d 813, 817 (Mont. 1976).

Conversely, in the context of a fixed-price ROFR (like OLCDC's), requiring such a third party offer would serve absolutely no purpose because a fixed-price ROFR supplies its own definite terms of sale (here, debt plus taxes). Thus, adding an "offer" requirement to OLCDC's ROFR where none is expressly included or supported, as Defendants urge, would only serve to make it nearly impossible for OLCDC to exercise its ROFR. *See Homeowner's Rehab*, 99 N.E.3d at 759, 761-62 & n.16 (refusing to interpret the right of first refusal in such a way that "the nonprofit developer could be denied any meaningful opportunity to acquire the property interest at the § 42 price").

Moreover, common law across the nation undermines Defendants' interpretation and supports OLCDC's interpretation. Universally consistent common law on rights of first refusal recognizes that the defining characteristic of the right is that its "binding effect" turns on whether "the offeror decides to sell." *Winberg v. Cimfel*, 532 N.W.2d 35, 39 (Neb. 1995) (quoting 11 Samuel Williston, A Treatise on the Law of Contracts § 1441A at 948-50 (3d ed. 1968)); *Barling*

v. Horn, 296 S.W.2d 94, 98 (Mo. 1956) (a right of first refusal "requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the pre-emption, at the stipulated price") (quoting Vol. VI, American Law of Property, § 26.64, p. 507)) (emphasis added).

Lastly, Defendants' interpretation that the ROFR's 45-day notice period constitutes the ROFR's trigger fails. Contrary to Defendants' assertion, this notice period is a procedural safeguard providing the minimum amount of time that Defendants must afford OLCDC to consider whether to exercise its right; it cannot serve as the simultaneous trigger and breach of the ROFR, as Defendants urge. *See Riverside Surgery Ctr., LLC v. Methodist Health Sys., Inc.*, 182 S.W.3d 805, 807, 812 (Tenn. Ct. App. 2005).

Defendants' affirmative defenses are insufficient as a matter of law. For a plaintiff "to obtain a summary judgment when the defendant asserts affirmative defenses, the plaintiff must either disprove those defenses by evidence or establish the legal insufficiency of the defenses." *Bunner v. Florida Coast Bank of Coral Springs, N.A.*, 390 So. 2d 126, 127 (Fla. 4th DCA 1980). Here, OLCDC has carried its burden of disproving each of Defendants' affirmative defenses in both respects. The undisputed material facts conclusively establish that OLCDC did not force a sale of Aswan Village upon Defendants, did not engage in any wrongdoing, and did not trick Defendants. Quite the opposite, Defendants were aware at all times of the applicable rights and obligations, unilaterally solicited proposals for the sale of Aswan Village, and OLCDC merely sought to lawfully protect its interests and exercise its contractual rights. There is no material evidence of record to support Defendants' assertion that OLCDC's request for more information on March 18, 2019 caused Defendants to solicit proposals (Defendants, indeed, already had

them) and/or coerced Defendants to "decide[] to move forward" with LAC's LOI. Defendants' affirmative defenses thus fail as a matter of fact.

In addition, Defendants' affirmative defenses fail as a matter of law. First, Defendants' equity-based affirmative defenses, such as unclean hands, are insufficient as a matter of law because they do not apply to a claim for specific performance of a contract for real estate under Florida law. E.g., Florida Kelly Plantation v. Gilliam, Ltd., No. 3:11CV159/EMT, 2012 WL 13032897 at * 8-9 (N.D. Fla. Sept. 18, 2012) (quoting Henry v. Ecker, 415 So. 2d 137, 140 (Fla. 5th DCA 1982)). Second, there is no evidence in this record to suggest Plaintiff failed to satisfy any conditions precedent. (Aff. Defense II). Third, Defendants' recoupment defense is actually predicated on OLCDC obtaining specific performance; thus, it cannot serve to bar it. (Aff. Defense X) And fourth, Defendants' defense of breach of the implied covenant of good faith and fair dealing fails because the conduct about which Defendants complain—OLCDC's alleged acquiescence to Defendants' unilateral sales efforts—has no basis in the ROFR or in the Amended Operating Agreement. Instead, it is premised on an entirely separate contract—the ADA Agreement. (Aff. Defense XI). Defendants' assertion that OLCDC breached an implied covenant under a different contract cannot be used to bar OLCDC's claim for specific performance under the ROFR. See Focus Mgmt. Group USA, Inc. v. King, 171 F. Supp. 3d 1291, 1300 (M.D. Fla. 2016); Ament v. One Las Olas, Ltd., 898 So. 2d 147, 149 (Fla. 4th DCA 2005).

OLCDC is also entitled to summary judgment on each of Defendants' Counterclaims. First, Count I fails based on the undisputed failure to satisfy conditions precedent. *See, e.g., Garcia v. Cosicher*, 504 So. 2d 462, 462 (Fla. 3d DCA 1987). Here, Defendants concede that OLCDC never "directed" HKA to cause the Company to place Aswan Village "on the market for

sale." (Burnes Dep. at 80:21-23; 85:1-18; Hess Dep. at 50:1-52:8; 66:15:67:8; 68:10-15.) Defendants, moreover, assert that they never even offered to sell Aswan Village to OLCDC. (Hess Depo. at 71:7-15; Compl., Ex. H). However, *all* of these things are **express conditions precedent** to HKA's rights under Section 10 of the ADA Agreement, which is the premise of its claim under Count I. Thus, Count I fails as a matter of law. *See Garcia*, 504 So. 2d at 462.

Count II (unjust enrichment) similarly fails based on (1) the undisputed existence of express contracts governing the same subject matter, and (2) the fact that HKA received exactly what it bargained for under those contracts.

Defendants do not dispute that a valid contract governs. Rather, they claim that OLCDC's ability to exercise the ROFR it bargained-for would confer an unjust windfall on OLCDC, thus overriding the ROFR. Defendants' argument fails. =. First, it is contrary to the settled foregoing Florida law. Second, it is undisputed that HKA attempted to obtain OLCDC's agreement to give up its ROFR in 2014. But OLCDC refused, and the ROFR remained. The compromise struck was the addition of a "distinct" forced sale right. HKA's attempt to now renege on its choice to allow the distinct ROFR to remain, after freely triggering it, and nevertheless force OLCDC to buyout HKA, would be anything but just. *See Mercer v. Lemmens*, 40 Cal. Rptr. 803, 806 (Cal. Ct. App. 1964) (refusing defendant's "bad faith" attempt to circumvent the agreed-upon ROFR due to the foreseeable appreciation of the at-issue property); *Schroeder v. Gemeinder*, 10 Nev. 355, 369 (1875) (same).

Accordingly, for the reasons set forth above,

ORDERED AND ADJUDGED as follows:

1. Defendants' Motion for Summary Judgment against OLCDC is DENIED, and OLCDC's Renewed Motion for Partial Summary Judgment against Defendants is **GRANTED**;

- 2. Defendant HallKeen Management's Motion for Summary Judgment on Count I against OLCDC is DENIED;
- 3. OLCDC's Motion for Judgment on the Pleadings is **DENIED AS MOOT**;

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 07/07/20.

WILLIAM THOMAS
CIRCUIT COURT JUDGE

No Further Judicial Action Required on <u>THIS</u>

<u>MOTION</u>

CLERK TO <u>RECLOSE</u> CASE <u>IF</u> POST

JUDGMENT

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file. <u>Copies Furnished To</u>:

All Counsel on attached Service List **SERVICE LIST**

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